(18)

No. 01-332-CFX Title: Board of Education of Independent School District No. 92 of Pottawatomie County, et al., Petitioners
v.
Lindsay Earls, et al.

Docketed:
August 24, 2001 Court: United States Court of Appeals for the Tenth Circuit

Entry	Date	Proceedings and Orders
	Aug 24 2001	Petition for writ of certiorari filed. (Response due September 23, 2001)
	Sep 24 2001	Brief of respondents Lindsey Earls and Lacey Earls in opposition filed.
	Oct 10 2001	DISTRIBUTED for Conference of October 26, 2001
	Oct 10 2001	Record requested.
	Oct 25 2001	Record filed.
	Oct 29 2001	REDISTRIBUTED for Conference of November 2, 2001
	Nov 8 2001	Petition GRANTED. SET FOR ARGUMENT March 19, 2002.
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	Nov 28 2001	Record filed.
	Dec 20 2001	Brief amici curiae of Drug-Free Schools Coalition, et al. filed.
	Dec 21 2001	Brief of petitioners Board of Education, et al. filed.
	Dec 21 2001	Joint appendix filed.
	Dec 26 2001	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Dec 26 2001	Brief amicus curiae of United States filed.
	Dec 26 2001	Brief amici curiae of National School Boards Assn. (To Be Recovered & Reprinted) filed.
	Jan 4 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jan 22 2002	Order extending time to file respondents' brief on the merits to and including February 6, 2002.
	Jan 23 2002	CIRCULATED.
	Jan 29 2002	Blanket consent to the filing of amicus briefs in support of either party received from counsel for the petitioner and counsel for the respondents,
	Feb 6 2002	Brief amici curiae of Jean Burkett, et al. filed.
	Feb 6 2002	Brief amici curiae of Akhil Reed Amar and Vikram Amar filed.
	Feb 6 2002	Brief amici curiae of American Academy of Pediatrics, et al. filed.
	Feb 6 2002	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Feb 6 2002	Brief amicus curiae of Rutherford Institute filed.
	Feb 6 2002	Brief amici curiae of Juvenile Law Center, et al. filed.
	Feb 7 2002	Brief of respondents Lindsay Earls and Lacey Earls filed.
	Feb 19 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Mar 6 2002	Reply brief of petitioners Bd. of Education of Independent School District 92, et al. filed.
	Mar 19 2002	ARGUED.

JPP

Supreme Court
FILED

01-332 AUG 24 2001

No. ___

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IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY AND INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY,
Petitioners,

v.

LINDSEY EARLS and LACEY EARLS, minors, by their next friends and parents, John David and Lori Earls, and DANIEL JAMES, a minor, by his next friend and mother, Leta Hagar,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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August 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

116 pp

QUESTION PRESENTED

Boards of education throughout the country consider the suspicionless drug-testing of students to be an effective and essential deterrence to drug use and a means to provide treatment to student drug users. Since this Court's decision in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) ("*Vernonia*"), our nation's boards of education have grappled with courts' varying interpretations of the requirements of the Fourth Amendment regarding their authority to test students for drug use. A clear conflict now exists among the circuit courts on the extent of that authority.

The question presented is whether the Tenth Circuit Court of Appeals properly determined that a board of education cannot validly exercise its judgment in an effort to deter and eliminate student drug use by enacting a suspicionless drug-testing policy covering students who voluntarily engage in interscholastic competition unless the board has first specifically identified and quantified the actual drug users among the students to be tested.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CITED AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	11
I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS REGARDING WHETHER OR NOT A SEVERE DRUG PROBLEM MUST BE SHOWN BEFORE A SCHOOL BOARD MAY CONSTITUTIONALLY INITIATE A DRUG-TESTING PROGRAM APPLICABLE TO STUDENTS INVOLVED IN EXTRACURRICULAR ACTIVITIES	12
II. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ON THE CONSTITUTIONALITY OF STUDENT SEARCHES, GENERALLY, AND STUDENT DRUG TESTING SPECIFICALLY	18
III. THE DECISION BELOW IMPOSES AN IMPERMISSIBLE RESTRAINT UPON THE DISCRETION OF LOCAL BOARDS OF EDUCATION WHICH WARRANTS THIS COURT'S IMMEDIATE REVIEW	25
CONCLUSION	28

TABLE OF CONTENTS—Continued

	Page
Appendix A	1a
Appendix B	46a
Appendix C	47a
Appendix D	50a
Appendix E	79a
Appendix F	80a

TABLE OF CITED AUTHORITIES

CASES	Page
Acton v. Vernonia School Dist. 47J, 796 F.Supp 1354 (D. Ore. 1992)	6
Acton v. Vernonia School Dist. 47J, 23 F.3d 1514 (CA9 1994)	13, 14
Board of Educ., Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853 (1982)	26
Chandler v. Miller, 520 U.S. 305 (1997)	8
Earls v. Board of Edu. of Tecumseh Public School District, 115 F.Supp.2d 1281 (W.D. Okl. 2000)	1
Earls v. Board of Edu. of Tecumseh Public School District, 242 F.3d 1264 (CA10 2001)	1
Ferguson v. City of Charleston, 532 U.S. ____, 121 S. Ct. 1281 (2001)	16, 17
Knox County Education Association v. Knox County Board of Education, 158 F.3d 361 (CA6 1998)	15
Miller v. Wilkes, 172 F.3d 574 (CA8 1999)	2, 15, 16
New Jersey v. TLO, 469 U.S. 602 (1989)	11, 18
Oklahoma High School Athletic Ass'n v. Bray, 321 F.2d 269 (CA10 1963)	5
Skinner v. Railway Labor Executives Ass'n., 489 U.S. 602 (1989)	23
Todd v. Rush County Schools, 983 F.Supp 799 (S.D. Ind. 1997)	13, 14
Todd v. Rush County Schools, 133 F.3d 984 (CA7 1998) (rehearing and suggestion for rehearing *en banc* denied 139 F.3d 571 (CA7 1998)) (*cert. denied* 525 U.S. 824 (1998))	2, 13, 16, 17
Treasury Employees v. Von Raab, 489 U.S. 656 (1989)	16, 23

TABLE OF CITED AUTHORITIES—Continued

	Page
Trinidad School Dist. No. 1 v. Lopez, 963 P.2d 1095 (Colo. 1998)	11
Vernonia School District 47J v. Acton, 515 U.S. 646 (1995)	i, 4, 19, 20, 23, 24, 25
CONSTITUTION AND STATUTES	
U.S. Const. amend. IV	1
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1331	7
28 U.S.C. § 1343	7
MISCELLANEOUS	
Respondent's Brief, *Vernonia School Dist. 47J*, 515 U.S. 646 (1995) (No. 92-590)	7

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra,* 1a-45a) is reported at 242 F.3d 1264 (CA10 2001). The court of appeals' order denying a petition for rehearing and suggestion for rehearing *en banc* (App. B, *infra,* 46a) and the court of appeals' order granting attorney fees and costs (App. C, *infra,* 47a-49a) are unreported. The district court's opinion (App. D, *infra,* 50a-78a) is reported at 115 F.Supp.2d 1281 (W.D. Okl. 2000). The district court's judgment (App. E, *infra,* 79a) and amended judgment[1] (App. F, *infra,* 80a-81a) are unreported.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion on March 21, 2001, and denied rehearing and rehearing *en banc* on May 30, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

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[1] After the district court rendered its opinion, the court allowed Plaintiffs to amend the judgment to add as a Plaintiff Lacey Earls in order to avoid any mootness problem, since Lindsay Earls and Daniel James were seniors in high school. Respondents Lindsay Earls and Daniel James have now graduated from high school. Respondent Lacey Earls remains a student in Petitioners' school.

Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This case involves the authority of a local board of education to determine if students are using drugs in its school district and the extent of its authority to implement a suspicionless drug-testing program as a means to deter and combat the drug use.

Contrary to the Seventh Circuit's opinion in *Todd v. Rush County Schools*, 133 F.3d 984 (CA7 1998) (rehearing and suggestion for rehearing *en banc* denied 139 F.3d 571 (CA7 1998)) (*cert. denied* 525 U.S. 824 (1998)) ("*Todd*"),[2] the Tenth Circuit holds that there is some unknown and undefined quantum of drug use among students which must be reached and therefore condoned by school officials before a board of education may implement a suspicionless drug-testing policy.

When constitutional challenges are brought against student drug-testing policies, the Tenth Circuit has determined that a board of education must prove in a rigid, legalistic fashion that a "severe enough" drug problem has gained a stronghold among certain students before it may take steps to deter and treat the problem through suspicionless drug-testing.

1. Petitioners are a public school district located in Tecumseh, Oklahoma, and its governing body charged with the tutelage, supervision and safety of the students within its boundaries. Tecumseh, Oklahoma is a predominantly rural community located approximately forty miles from

[2] The Tenth Circuit opinion also conflicts with the Eighth Circuit's published opinion in *Miller v. Wilkes*, 172 F.3d 574 (CA8 1999) ("*Miller*"). However, that judgment was vacated on grounds of mootness and rehearing dismissed on June 15, 1999. *Miller*, 172 F.3d at 582.

Oklahoma City. Consistent with the practice of most public schools, Petitioners offer activities beyond the traditional and required educational curriculum for their students. These voluntary student activities are provided primarily because society has placed upon Petitioners an ever-expanding role in the development of our children.

The traditional six-hour day has all but vanished in our society. Students are now engaging in activities on campus before classroom instruction begins, after classroom instruction ends, and on weekends. Students are also often off-campus traveling to other towns, cities and states, enjoying the benefits of the additional opportunities offered by Petitioners and other public schools throughout the nation.

As these extracurricular opportunities have expanded, the responsibilities of Petitioners have also increased. Petitioners are now responsible for the health and safety of students during untraditional times in untraditional settings.

In response to a long-standing problem of drug use among students in its school district, Petitioners have undertaken various measures to deter and eradicate this insidious problem. Those measures include surveillance cameras, drug education, drug dogs, and increased security personnel. Despite those measures, school officials continue to be aware that drug use among its students has not been eliminated. The individual members of the Petitioner board of education, who are all parents or grandparents of students in the school district, have reasonably relied upon information given to them by parents, administrators, teachers and students to determine that drug use among the students exists. Likewise, administrators and teachers have not only reasonably relied upon information they have received from students, but also from their observations of student conduct, awareness of student discussion of drug use, detection of the odor of marijuana, and knowledge of students who have been placed in drug rehabilitation programs to determine that the

long-standing drug problem in the school district is still a very real concern.

The subject of drug testing to combat student drug abuse has been discussed by the members of the Petitioner board of education since at least the 1994-95 school year.

During the 1997-98 school year, drug use by students was beginning to be openly acknowledged by the community. Patrons began telephoning individual members of the board of education and some even stopped them in the street to discuss the drug problem among students. A parent appeared at a public board of education meeting in February 1998, and openly discussed the drug abuse that was affecting her son and other students in the school district. A short time after that board meeting, marijuana was found in the school parking lot and marijuana was found on a student at school.

In September 1998, Petitioners implemented a suspicionless drug-testing program.[3] Prior to implementing the program, Petitioners considered various options and were aware of this Court's decision in *Vernonia* as well as the Seventh Circuit's reasoning in *Todd*. Petitioners considered testing only athletes (as in *Vernonia*), testing all students involved in any extracurricular activity (as in *Todd* and *Miller*), and testing all students in the school district. Petitioners also held a public meeting and invited its patrons to comment on the proposed program. Approximately fifty patrons attended the meeting, including the mother of Respondents Lindsay and Lacey Earls, and not one patron voiced disagreement with the suspicionless drug testing of their children.

After discussion and community participation, the Petitioner board of education limited the program to cover only those students who engage in interscholastic competition

[3] The program contained in the drug-testing policy adopted by Petitioners is patterned after and similar to the program approved by this Court in *Vernonia*, 515 U.S. at 658-660.

regulated by the Oklahoma Secondary Schools Activities Association ("OSSAA"). Every Oklahoma public school district that desires to engage in interscholastic competition must belong to the OSSAA, a statewide organization that regulates such activities. Failure of a school district or a participating student to abide by the rules and regulations of the OSSAA relating to interscholastic competition may result in the suspension from membership and/or ineligibility of the student to compete with any member school district of the OSSAA or member school district of a similar organization in another state. *See generally, Oklahoma High School Athletic Ass'n v. Bray*, 321 F.2d 269 (CA10 1963).

The program covered by the policy does not impose any academic sanctions upon a student who refuses to submit to a drug test or for a student who tests positive, nor does it prohibit a student from participating in any extracurricular activity. The program only prohibits a student who refuses to take the drug test from practicing for or engaging in the interscholastic competitive component of the activity, *i.e.*, regional, state and national contests. Moreover, if a student tests positive, the student is allowed to continue in interscholastic competition if the student agrees to participate in drug counseling and demonstrates no further drug use. If the student refuses to obtain counseling or continues to use drugs, the student can remain in the extracurricular activity, but is prohibited from further interscholastic competition for the remainder of the school year.

The activities involved in interscholastic competition are Athletics, Cheerleading, Pom Pon, Vocal, Band, FFA, FHA and Academic Team. Petitioners did not decide to direct the drug-testing program only to interscholastic competition on the premise that the students who engage in such competition are the only students, or even the most likely students, to abuse drugs. Interscholastic competitive activity participants were chosen in an effort to deter and hopefully eliminate drug

abuse by the large part of the student population:[4] 1) who have not been insulated from drug use; 2) who have already voluntarily placed themselves under more stringent academic and out-of-school rules and regulations; 3) who have a lesser degree of privacy than the general student population; and 4) who, with minimum school supervision, reap the benefits of representing the school district in competitions with students from all over the country and enjoy the privilege offered by the Petitioner board of education to travel and see the world outside of Tecumseh, Oklahoma. None of the other drug-preventative measures implemented by Petitioners are available or can be utilized for these students when they are competing off-premises.

The drug-testing policy provides that all students who desire to participate in interscholastic competitive activities are first tested at the beginning of the school year, at a specified and announced time. Thereafter, names are drawn at random each month for random student testing. Because the drug-testing was not commenced until midyear during the 1998-1999 school year, there was no initial testing that year of all students who desired to participate in the interscholastic competitive activities. However, random testing was initiated and 243 students were randomly tested during that school year. Three students tested positive, all of whom were involved in Athletics and two of which were also involved in the competitive activities of FFA. App. A, *infra*, 15a. In the 1999-2000 school year, the initial testing was started, and 241

[4] As the district court below recognized, "it can scarcely be disputed that the drug problem among the student body is effectively addressed by making sure that the large number of students participating in competitive, extra-curricular activities do not use drugs." App. D, *infra*, 77a. This is comparable to the situation in Vernonia, where "[a]pproximately 60-65% of the high school students and 75% of the elementary school students participate[d] in district sponsored athletics." *Acton v. Vernonia School Dist. 47J*, 796 F.Supp 1354, 1356 (D. Ore.1992).

students were tested. One child tested positive.[5] When this lawsuit was filed in August of 1999, Petitioners voluntarily suspended the drug-testing policy.[6] Of the students who tested positive for drug use, all but one chose to obtain counseling and stop taking illegal drugs. The policy was effective in deterring drug use and in providing treatment for those students whose drug abuse was detected.

2. Respondents brought this action in the district court and invoked its jurisdiction under 28 U.S.C. §§ 1331 and 1343.

Respondents are three students who, through their parents, contend they have the right under the Fourth and Fourteenth Amendments of the United States Constitution to participate in interscholastic competition without being required to submit to a suspicionless drug test. Respondents challenged the drug-testing policy as to all interscholastic competitive activities except Athletics, noting in their Complaint that such a program has been approved by this Court.

Respondent Lindsay Earls appeared on national television in August 1999, shortly after filing the lawsuit, and stated her belief that a widespread drug problem existed in the school district. She later stated in her deposition that after conferring with her friends she was unsure whether or not the drug problem was widespread. Moreover, she did not know if students involved in extracurricular activities use drugs.

At the time of the filing of the lawsuit, Respondent Daniel James had been enrolled in the school district for a little more than eighteen months. During that limited period of time, he had personally observed about a dozen students under the

[5] Although not mentioned in any of the *Vernonia* opinions, during the three years the drug-testing policy was in effect there only two students tested positive for drug use. Respondent's Brief at 7, *Vernonia*, (No. 92-590) (filed February, 1995).

[6] Therefore, the initial testing was not completed and many students, primarily non-athletes, were not tested at all during the 1999-2000 school year.

influence of drugs in out-of-school environments and knew of two students who had been admitted to drug rehabilitation facilities for drug abuse. He knew that students smoked marijuana in the city park during their lunch hour. He was also a member of an organization known as Life Guides, which conducted programs in a number of school districts, including the Petitioners' district, to educate students on the perils of drug use.

In spite of their knowledge of the drug use by students in the school district, Respondents argued to the district court that the evidence did not show a sufficient drug crisis to warrant suspicionless testing. Respondents urged the district court to conclude that this Court's holding in *Vernonia* was limited to the athletic arena because of the particular hazard of physical injury inherent in sports that would be exacerbated by drug abuse and the reduced privacy expectation of athletes. While recognizing that *Vernonia* acknowledged the existence of a "special need" in the public school context, Respondents further argued that *Chandler v. Miller*, 520 U.S. 305 (1997), reinvented the doctrine to require a school district to prove a "special need" different from the one recognized in *Vernonia* before a court can proceed to the balancing test set forth in *Vernonia*. According to Respondents, this new and different "special need" does not exist unless a board of education can show documented drug abuse among identified students to be tested or that drug abuse among the group to be tested poses a serious and particularized threat of injury to the group. Arguing that Petitioners could neither prove extraordinary drug use among the students to be tested, nor prove that non-athletic competition posed inherent danger of injury, Respondents concluded that there was no "special need" as required by *Chandler v. Miller, supra*. Therefore, they contended the need to balance the competing interests of the parties as set forth in *Vernonia* did not exist.

3. Being presented with cross-motions for summary judgment, the district court relied upon *Vernonia* to conclude that Petitioners' drug-testing program was reasonable. App. D, *infra*, 78a. In its opinion, the district court thoroughly recounted the evidence presented by both sides and compared it to the evidence and the reasoning employed by this Court in *Vernonia* and followed by the Seventh Circuit in *Todd*.

The district court reasoned that Petitioners indeed had demonstrated cause to be concerned about illegal drug use. The district court declined to agree with Respondents that a drug epidemic must be a precondition of suspicionless testing by noting "[t]he Supreme Court has found special governmental needs to justify suspicionless drug-testing in other contexts, without first finding a pervasive drug problem among the group to be tested." *Id.* 56a. The district court further disagreed that *Vernonia* required a showing of substantial risk of physical injury[7] or irrefutable evidence of actual use or possession of illegal drugs by students in order to determine that the school district presented an environment of "special needs." With regard to the latter, the district court found that "the Supreme Court's holding in Vernonia does not require a school district to isolate those students most likely to use drugs." *Id.* 77a. The district court concluded that the testing of students who desire to participate in interscholastic competition is a reasonable means adopted by Petitioners to attempt to stop and further deter drug use in light of the diminished privacy expectations of those students and the minimal intrusion of the collection process utilized. *Id.* 78a.

4. The court of appeals likewise stated it relied upon *Vernonia* as the only controlling precedent and declined to apply *Chandler v. Miller*, *supra*, to a student drug-testing challenge. App. A, *infra*, 9a. However, the Tenth Circuit reached the opposite result and held that Petitioners' drug-testing policy was unconstitutional. *Id.* 24a-25a.

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[7] App. D, *infra*, 59a-60a

The court of appeals at first acknowledged that the school setting is an environment where "special needs" for the relaxation of the Fourth Amendment exist. It then proceeded to balance the competing private and governmental interests as required by *Vernonia*.

With respect to the privacy interests of Respondents, the Tenth Circuit recognized that students engaging in interscholastic competition have an even more diminished expectation of privacy than the general student population [8] and the collection process utilized by Petitioners was minimally intrusive.[9]

With regard to the governmental side of the balancing scale, the Court of Appeals held that the nature of the governmental concern must be based upon something other than deterrence of drug use among the students to be tested. The Tenth Circuit placed strong emphasis upon this Court's recognition of the increased danger of injury to student athletes in *Vernonia*, and required proof of safety concerns unique to each interscholastic competitive group to be tested. Thus, the Tenth Circuit held that Petitioners' concerns that students involved in interscholastic competition are at increased risk because of the threat of injury and decreased supervision fail as a basis for drug testing because the program excluded segments of the entire student population where other safety risks exist and included some competitive activities where the risk of injury is minimal. *Id.* 24a.

As to the immediacy of Petitioners concern of student drug use, the Tenth Circuit found that the board of education failed to identify actual drug users engaging in interscholastic competition in order to demonstrate that a drug problem existed. *Id.* In reaching this conclusion, the Tenth Circuit relied upon the Colorado Supreme Court's interpretation of

[8] App. A, *infra*, 21a.

[9] *Id.* 22a.

Vernonia, which had struck down a student drug-testing policy because it "swept within its reach students participating in an extracurricular activity who were not demonstrated to play a role in promoting drugs and for whom there was no demonstrated risk of physical injury." *Id*, 24a (quoting *Trinidad School Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1110 (Colo. 1998)).

The Tenth Circuit has interpreted *Vernonia* to require a school district to "demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem" before the school can impose suspicionless drug-testing as a prerequisite to participating in interscholastic competition. App. A, *infra*, 25a. Finding Petitioners' evidence to be "hearsay," [10] "anecdotal"[11] and "negligible"[12] with regard to students engaged in interscholastic competition, the court of appeals reversed the district court, holding the policy unconstitutional.

REASONS FOR GRANTING THE PETITION

The Petition should be granted for three reasons:

First, as the Tenth Circuit readily acknowledged,[13] its decision in this case directly conflicts with the Seventh Circuit's decision in *Todd* and the Eighth Circuit's decision in *Miller*.

Second, the decision of the court of appeals conflicts with this Court's decision and reasoning in *Vernonia*, *supra*, and *New Jersey v. TLO*, 469 U.S. 602 (1989)

[10] App. A, *infra*, 17a.

[11] *Id.*

[12] *Id.* 19a.

[13] App. A, *infra*, 26a.

("*TLO*") by setting forth different requirements for school officials contemplating the need for a student search within its jurisdiction.

Third, the issue presented is of major importance not only to Petitioners, but to all public schools in the nation which are responsible for the safety of the students under their supervision on a daily basis and must address drug use which threatens their safety.

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS REGARDING WHETHER OR NOT A SEVERE DRUG PROBLEM MUST BE SHOWN BEFORE A SCHOOL BOARD MAY CONSTITUTIONALLY INITIATE A DRUG-TESTING PROGRAM APPLICABLE TO STUDENTS INVOLVED IN EXTRACURRICULAR ACTIVITIES.

As the Tenth Circuit explicitly recognized, its decision departs from, disagrees with, and causes a conflict between the law applicable in the Tenth Circuit and that of the Seventh and Eighth Circuits. App. A, *infra*, 26a. This creates a dilemma for school districts in the remaining circuits and causes non-uniformity on this important constitutional question.[14]

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[14] As recognized by the Tenth Circuit, "[t]he Fifth Circuit will have an opportunity to revisit this issue, because another Texas district court has recently held unconstitutional the random suspicionless drug testing of all students participating in extracurricular activities. *Gardner v. Tulia Indep. Sch. Dist.*, No. 2:97—CV-020-J (N.D. Tex. filed Dec. 7, 2000). The school district has appealed the case to the Fifth Circuit. The court in *Gardner*, after noting that there was no evidence of a drug problem among students in general at the Tulia schools or among those participating in extracurricular activities and therefore subject to testing, held that *Vernonia* 'was limited to random drug testing of the student athletes.' Slip op. at 8." App. A, *infra*, 27a, footnote 14. This Texas case further highlights the confusion and varying interpretations in the courts regarding the proper application of *Vernonia*.

In *Todd*, the Seventh Circuit was reviewing the constitutionality of a drug-testing policy which required all students who desired to participate in any extracurricular activity and students who chose to drive back and forth to school in their own vehicles to consent to suspicionless random drug-testing as a condition of being allowed to engage in those activities. The Seventh Circuit began its analysis by fully recognizing that the outcome of the case was governed by this Court's decision in *Vernonia*. *Todd*, 133 F.3d at 986.

In concluding that the drug-testing program in *Todd* was sufficiently similar to the drug-testing program in *Vernonia* to pass constitutional muster, the Seventh Circuit emphasized the voluntary aspect of student participation in extracurricular activities and the fact that the program was designed to deter drug use and not to catch and punish drug users. *Id.*

The Seventh Circuit did not disturb and affirmed the lower court's finding that the evidence of a drug problem in the school relied upon by the board of education to support the initiation of the policy, while "sketchy,"[15] did not cause the drug-testing policy to be unconstitutional. Recognizing that "the empirical evidence [was] not particularly indicative of drug, alcohol or tobacco use by a majority (or even a large minority) of the students [and] . . . the subjective observations

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[15] *Todd v. Rush County Schools*, 983 F.Supp. 799, 803 (S.D. Ind. 1997). This is virtually identical to the evidence considered by the Ninth Circuit in *Acton v. Vernonia School Dist. 47J*, 23 F.3d 1514, 1519 (CA9 1994) (overruled by *Vernonia*, 515 U.S. 646) where, the Ninth Circuit "reemphasize[d] that what the evidence shows, and all it shows, is that there was some drug usage in the schools, that student discipline had declined, that athletes were involved, and that there was reason to believe that one athlete had suffered an injury because of drug usage and others may have."

[relied upon to support the policy in *Todd* were] somewhat vague, interspersed with what appears to be a motivating view that society in general has a drug problem,"[16] the district court found the governmental concern as articulated in *Vernonia* was established.

Contrary to the Tenth Circuit's departure from *Vernonia* where it holds that there must be an "identifiable" drug problem among a "sufficient" number of the students to be tested,[17] the district court in *Todd* agreed with this Court that "[t]here is no minimum triggering point of substance abuse (such as ten percent or fifty percent of the student population) that must be met to justify the 'important enough' interest on the part of the school system discussed in *Vernonia*. Some use of these prohibited substances by youth may give rise to legitimate concern about the potential for a rapid increase in abuse, if unchecked." *Todd v. Rush County Schools*, 983 F.Supp. 799, 806 (S.D. Ind. 1997).

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[16] *Todd v. Rush County Schools, supra,* 983 F. Supp. at 803.

[17] In this particular respect, the Tenth Circuit adopts the holding of the Ninth Circuit that the student drug-testing policy there was unconstitutional on the basis that the dangers of drug abuse did not present the type of potential disaster that would warrant suspicionless drug testing of students. *Acton v. Vernonia School Dist. 47J, supra,* 23 F.3d at 1526. However, even the Ninth Circuit recognized that a school district could properly have a reasonable governmental concern of drug abuse without a showing that there was an "identifiable problem" among a "sufficient" number of students as now required in the Tenth Circuit. The Ninth Circuit acknowledged that the evidence presented by the school district there did not prove extensive drug use by students (footnote 15, *infra*), but stated: "Perhaps dubbing this a 'problem' is a matter of perception or definition. What appears to be a problem in one place might seem to be a minor annoyance elsewhere. Suffice it to say that drug use appeared to be more extreme than it should be and even seemed to be growing. It was sufficient to give them concern for the future of the youths they had responsibility for. Based upon the evidence, we cannot say that the concern was unreasonable." *Id.*, 23 F.3d at 1519.

The Eighth Circuit similarly addressed the random suspicionless drug-testing of all students engaged in any extracurricular activity in *Miller*.[18] In that case, the court likewise acknowledged that its disposition was controlled by this Court's decision in *Vernonia*. *Miller*, 172 F.3d at 578. In performing that analysis, unlike the Tenth Circuit in the instant case, the Eighth Circuit explicitly declined to read *Vernonia* to require a showing of an "identifiable" drug problem among the students to be tested before such a program could be initiated. In fact, the Eighth Circuit specifically found that there was no record evidence of any drug problem in the school whatsoever in *Miller* and that the drug problem was not in any measure "quantifiable." *Id.* 172 F.3d at 580-581. Contrary to the explicit holding of the Tenth Circuit that deterrence of drug abuse is not a sufficient governmental interest to warrant a suspicionless drug-testing program, the Eighth Circuit finds the need for deterrence is "imperative." *Id.* 172 F.3d at 580. The Eighth Circuit agrees with the Seventh Circuit that under *Vernonia* there is "no reason that a school district should be compelled to wait until there is a demonstrable problem with substance abuse among its own students before the district is constitutionally permitted to take measures that will help protect its schools against the sort of 'rebellion' proven in *Vernonia*, one 'fueled by alcohol and drug abuse as well as the student's [sic] misperceptions about the drug culture.'" *Id.* 172 F.3d at 581. Taking judicial notice of the drug problem that exists generally in this country, the Eighth Circuit recognized that a

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[18] Although the Tenth Circuit expressly stated its opinion conflicted with the *Miller* opinion, it technically did not do so. *Miller* was vacated upon a suggestion of mootness because the sole student plaintiff had graduated and a proper justiciable controversy no longer existed. *Miller*, 172 F.3d at 582. However, the unanimous opinion of the panel in *Miller* does certainly indicate how the Eighth Circuit will decide the same issue in the future, and may properly be considered in this analysis of the conflict among the circuits.

governmental concern to "have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context" is important enough to justify a suspicionless search. *Id.* (quoting from *Treasury Employees v. Von Raab,* 489 U.S. 656, 675 n. 3 (1989)).

The conflict this decision has created among the jurisdictions is three-fold:

1) In the Tenth Circuit, the deterrent primary purpose [19] of a drug-testing policy is not a sufficient governmental concern to be weighed against the students' privacy interests to determine if the policy is constitutional. App. A, *infra*, 22a. The Seventh and the Eighth Circuits hold directly to the contrary, and recognize, as the district court found in the instant case, that the deterrent purpose of the policy is in and of itself a sufficient governmental concern. *Todd*, 133 F.3d at 987 and *Miller*, 172 F.3d at 581.

2) The school boards located in the Tenth Circuit's jurisdiction must be able to demonstrate an "identifiable" drug problem among the specific students to be tested before they are able to satisfy the "nature and immediacy" prong of the analysis set forth by this Court in *Vernonia*. App. A, *infra*, 25a. Conversely, there is no requirement in the Seventh and the Eighth Circuits that a board of education must condone and demonstrate some minimum quantum of drug use among its students before it can constitutionally enact a drug-testing policy in an effort to deter the infestation of drug abuse among students.[20]

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[19] This Court has most recently explained that the programmatic purpose of a drug-testing program is a determinative factor in a "special needs" analysis. *Ferguson v. City of Charleston*, 532 U.S.____, 121 S.Ct. 1281, 1290 (2001).

[20] The Tenth Circuit's holding in this regard also conflicts with the Sixth Circuit's holding in *Knox County Education Association v. Knox County Board of Education,* 158 F.3d 361 (CA6 1998), that there need not be proof of a "pronounced" drug problem among teachers in a school before they could be compelled to submit to suspicionless drug-testing.

3) Finally, conflict is also present among the circuits with respect to the weight to be given to the voluntary aspect [21] of the activities when considering the nature of the privacy interests of the students to be tested. Contrary to the decision below, the Seventh Circuit, as well as the dissenting opinion of Judge Ebel in the Tenth Circuit,[22] find the voluntary nature of the activities compelling. *Todd*, 133 F.3d at 986 and App. A, *infra*, 39a-40a. Although the Tenth Circuit states that the privacy interests of students who voluntarily choose to compete is even more reduced than the diminished privacy interests of the student population at large,[23] the Tenth Circuit does not believe that further reduction "tips the scales" in the balancing test to any degree. There is now a split among the circuit courts of appeal with regard to the students who may be subject to a suspicionless drug-testing regime, and whether or not the voluntary participation aspect has relevance to the balancing test.

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[21] As Justice Kennedy explained in his concurring opinion in the most recent case where this Court has considered the "special needs" doctrine, *Ferguson v. City of Charleston, supra*, 121 S.Ct. at 1295, "[a]n essential, distinguishing feature of the special needs cases is that the person searched has consented, though the usual voluntariness analysis is altered because adverse consequences, (*e.g.*, dismissal from employment or disqualification from playing on a high school sports team), will follow from refusal. The person searched has given consent, as defined to take into account that the consent was not voluntary in the full sense of the word."

[22] "[The panel places] too little weight on the fact that the testing here is limited to extracurricular activities, where the students have voluntarily submitted themselves to additional supervision and regulation." App. A, *infra*, 39a-40a.

[23] *Id.* 21a.

II. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ON THE CONSTITUTIONALITY OF STUDENT SEARCHES, GENERALLY, AND STUDENT DRUG TESTING SPECIFICALLY.

In *TLO*, this Court acknowledged the unique position in which public school officials are placed by society. Recognizing that these officials have a substantial interest in maintaining order and discipline at schools, this Court refused to require school officials to educate themselves in the legalities of the Fourth Amendment to the United States Constitution when the search of a student is considered. Since that time the standard for a school search has been one of reason and common sense.

In the concurring opinion in *TLO*, Justice Blackmun first coined the phrase "special needs" to explain this exception to the requirements of the Fourth Amendment when he stated: "The elementary and secondary school setting presents a special need for flexibility justifying a departure from the balance struck by the Framers." *TLO*, 469 U.S. at 352.

That flexibility was recognized in *TLO* when the individualized search of the student's purse was conducted by a school official based solely upon information the official received from a teacher who claimed the student had been smoking. This evidence was clearly hearsay in its legal sense, but it was determined by this Court to be a "common sense conclusion about human behavior upon which practical people—including government officials—are entitled to rely." *Id.*, 469 U.S. at 346. By footnote this Court repeated its emphasis on the comprehensive authority of school officials, consistent with constitutional safeguards, to prescribe and control conduct in their school. *Id.*, 469 U.S. at 342, footnote 9.

Vernonia solidifies the well-settled principal that a public school is a special needs environment which constitutionally permits school officials to exercise a degree of control over students that cannot be exercised over adults, for the good of the students and their classmates. *Vernonia*, 515 U.S. at 655-656.

Vernonia sets the standard for school districts in the nation to implement suspicionless drug-testing programs in their schools. Due to the special needs of the school environment, the reasonableness of a school suspicionless search program is judged by balancing: 1) the nature of the privacy interest of the student and the character of the privacy intrusion, against; 2) the nature and immediacy of the governmental concern and the efficacy of the means employed for meeting the concern. "When the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake." *Id.*, 515 U.S. at 665.

It is well settled from *TLO* and its progeny that students generally have a diminished legitimate expectation of privacy when they are entrusted to the care of school officials. Whether or not this lessened privacy expectation, standing alone, is sufficiently diminished to allow suspicionless drug-testing is not addressed in *Vernonia* and is not at issue here. The Tenth Circuit determined, albeit reluctantly, that students wishing to participate in interscholastic competition have a reduced privacy expectation interest, and a drug-testing program, almost identical to the program in *Vernonia*, is minimally intrusive.

The factors which this Court found relevant in *Vernonia* to determine that the expectation of privacy among school athletes is further diminished, such as the voluntary nature of participation in competitive activities and the higher degree of regulation inherent in athletic competition, exist in all interscholastic competitive activities covered by the policy at

issue here. The third factor, the element of "communal undress," exists in a number of those activities. Yet, in balancing the nature of the governmental concern against these factors, the Tenth Circuit places a substantial burden of proof upon Petitioners as well as other school districts to outweigh the minimal expectation of privacy afforded to these students in order to tip the scale in favor of school officials. It is therefore the governmental side of the balancing scale and the weight afforded to each side wherein the conflict lies.

The nature of the State's interest as schoolmaster must be "an interest which is important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy." *Id.*, 515 U.S. at 661. It is clear, following *Vernonia*, that the deterrence of drug use by our nation's schoolchildren is an important enough concern in our public schools to justify a suspicionless search of students by school officials. This Court acknowledged that "the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction." *Vernonia*, 515 U.S. at 662.

Although the Tenth Circuit acknowledges the importance of deterrence, it interprets *Vernonia* as requiring something much more, and indeed that further programmatic purposes [24] must be demonstrated, before the nature of the governmental concern will be deemed important enough to support a suspicionless search. App. A, *infra,* 22a.

Petitioners disagree that deterrence, standing alone, is not a sufficient governmental concern to be weighed against the privacy expectations of the students in question. But, notwithstanding deterrence, even Petitioners' additional

[24] *See*, footnote 19, *infra.*

concerns of drug use generally, the risk of physical injury due to the nature of some of the activities and the risk of harm due to limited supervision, are not sufficient to meet this threshold test fashioned by the Tenth Circuit.

With regard to safety, the court of appeals holds that school districts must demonstrate the particularized risk of injury in the specific competitive activity that will be subject to the search before safety can be this additional factor of legitimate concern. "It is difficult to imagine how participants in vocal choir, or the academic team, or even the FHA are in physical danger if they compete in those activities while using drugs, any more than any student is at risk simply from using drugs." *Id.* 23a. Logically, if one is to interpret *Vernonia* as the court of appeals suggests, boards of education who implement suspicionless drug-testing programs for their athletes based in part on their concern for their safety will be required to exclude those athletes who compete in non-contact sports such as golf because the game of golf poses no inherent risk of danger any greater than students engaging in horseplay in the classroom. In the non-athletic competitive arena, this decision may well require school officials to exclude from its drug-testing program a band member who plays the flute and include in the program a band member who plays the tuba or twirls a burning baton because of the inherent particularized danger the size or nature of their instruments pose to students who are under the influence of illegal drugs, or to those around them.

The court of appeals in footnote 12 of the opinion thereafter proceeds to completely exclude safety as a legitimate concern by stating: "To the extent one could argue that the safety issue here is the health care risk of addiction or physical harm from the use of drugs, then the logical solution is to test all students. The fact that the District only tests a select group of students—those participating in extracurricular activities—indicates that its testing Policy is not

motivated simply by health care concerns." *Id.* 31a. This rationale will preclude all school districts within the boundaries of the Tenth Circuit from citing concern for the safety of its students as a factor when considering a suspicionless drug-testing program limited to one group of students.

Likewise, the nature of a school district's concern in the Tenth Circuit cannot be based in part upon the fact that students, while engaged in extracurricular competitive activities, are subject to decreased levels of supervision. As determined by the court of appeals, "[s]tudents who do not participate in any extracurricular activities are, at times, less supervised than they are in the classroom—when they are in the hallways between classes, at lunch, immediately before and after school while they are entering and leaving school premises." *Id.* 23a- 24a. Not only does the Tenth Circuit ignore the reality that teachers, police security and surveillance cameras are all utilized during the day to supervise and monitor the students when they are in the hallways, at lunch, and entering and leaving school, but also this concern once again becomes an all-or-nothing proposition.

In effect, a school district can implement a suspicionless drug-testing program in the Tenth Circuit only if the primary nature of the governmental concern goes beyond deterrence and encompasses all students who risk injury from drug abuse or all students who risk harm due to decreased supervision. *Vernonia* does not require such a perfect match, and as stated by Judge Ebel in his dissent from the Tenth Circuit decision: "In any event, we have never stated that a policy aimed at correcting a social ill need solve the entire problem in one fell swoop; in many cases it may be more prudent and efficacious to address social problems one step at a time, so that each step may be reviewed and adapted as necessary. *See, Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955) ('[T]he reform may take one step

at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind')." App. A, *infra*, 41a.

As for the immediacy of the concern, the *Vernonia* court relied upon the district court's finding that the "common sense" information gleaned by school officials, similar to the type of evidence accepted in *TLO,* indicated that a state of rebellion fueled by drug use existed at school and that athletes were involved. Petitioners readily admit that a state of rebellion does not exist at their school and the court of appeals correctly noted that *Vernonia* does not require such a showing. App. A, *infra,* 25a. However, this Court was quick to point out in *Vernonia* that it had previously upheld drug-testing programs in environments where special needs exist "based on findings of drug use by railroad employees nationwide, without proof that a problem existed on the particular railroads whose employees were subject to the test" [25] and "where there was no documented history of drug use by any customs officials." [26] *Vernonia,* 515 U.S. at 661. This Court further refused to hold a school district responsible for proving a compelling need for such a program by a "fixed, minimum quantum of governmental concern" as the Ninth Circuit appeared to do in the lower *Vernonia* decision. *Id.*

The Tenth Circuit decision requires more than a reasonable conclusion based on common sense information school officials receive from parents, teachers, members of boards of education, and other students, as well as their own observations of student conduct, that drug abuse exists in a school. In order to demonstrate the immediacy of its concern, a school district in the Tenth Circuit must now quantify a

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[25] Citing to *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602, 607 (1989)

[26] Citing to *Treasury Employees v. Von Raab, supra,* 489 U.S. at 673.

"sufficient" amount of drug abuse that actually exists among the specific group of students it intends to test, *i.e.*, a "fixed minimum quantum of governmental concern," before it can implement a drug-testing program.

Yet, the Tenth Circuit does not establish a "bright-line" test for school boards to use, and recognizes there will be more litigation surrounding the determination it left up to other boards of education to divine the actual fixed minimum quantum of drug abuse required to meet this burden. App. A, *infra*, 25a. This added requirement placed on school districts is specifically contrary to and at odds with this Court's legitimate concern for school officials in *Vernonia* where the individual detection of actual drug users at school "adds to the ever-expanding diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation." *Vernonia*, 515 U.S. at 664.

The Tenth Circuit has clearly articulated the law it establishes in our circuit: "Any district seeking to impose a random suspicionless drug-testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem." App. A, *infra*, 25a.

This decision applies well beyond the individual parties of this case. If it remains as the law in the Tenth Circuit, boards of education will be required to employ a method of drug detection which is beyond reasonable suspicion and even beyond probable cause to a method which must identify students and document proof of actual drug abuse before suspicionless drug testing will be constitutional. It will eliminate a vital tool utilized by those boards to deter and treat drug abuse by our children. It will require school

officials to point an accusatory finger at individual students and transform the process "into a badge of shame."[27]

Boards of education will be further required to condone the drug abuse of which they have knowledge based upon reason and common sense and educate and train their employees on the legal nuances of state and federal rules of evidence before the problem can be addressed through suspicionless drug testing. This decision is directly contrary to this Court's reasoning that "in many respects, we think, testing based on 'suspicion' of drug use would not be better, but worse." *Vernonia*, 515 U.S. at 664. This case accordingly merits this Court's intervention.

III. THE DECISION BELOW IMPOSES AN IMPERMISSIBLE RESTRAINT UPON THE DISCRETION OF LOCAL BOARDS OF EDUCATION WHICH WARRANTS THIS COURT'S IMMEDIATE REVIEW.

An overall theme emerges from this Court's decisions involving our nation's schools, *i.e.*, local boards of education have broad discretion in the control and management of our children and courts should be sensitive to and not interfere with that discretion unless basic constitutional values are directly and sharply implicated. As so eloquently stated by Chief Justice Burger, "local control of education involves democracy in a microcosm. In most public schools in the United States the parents have a large voice in running the school. Through participation in the election of school board members, the parents influence, if not control, the direction of their children's education. A school board is not a giant

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[27] In *Vernonia*, 515 U.S. at 663, this Court recognized "[i]t may be impracticable [to employ only suspicion-based student drug testing], for one thing, simply because the parents who are willing to accept random drug testing for athletes are not willing to accept accusatory drug testing for all students, which transforms the process into a badge of shame."

bureaucracy far removed from accountability for its actions; it is truly 'of the people and by the people.' A school board reflects its constituency in a very real sense and thus could not long exercise unchecked discretion . . . ."[28]

This Court has spent many hours and hundreds of pages providing guidance to boards of education when constitutional issues are implicated in their decisions. This guidance has set standards in layman's terms for boards of education to follow, recognizing that these boards are, in reality, simply parents elected by other parents to direct the education of their children and provide for their well being.

The *Vernonia* decision is no exception to this Court's consistency when addressing the unique issues relating to boards of education and the United States Constitution. It sets the standard, in layman's terms, to guide local boards when considering the implementation of suspicionless drug-testing program in their schools. The standard informs local boards that the implementation of such a program is a valid and constitutional exercise of their discretion when: 1) they believe through reason and common sense that drug abuse exists in their school; 2) when they take methods to deter and eliminate drug use that have had a limited effect on the problem; 3) when they ask for input and receive positive support from their community for the program; 4) when they adopt a program to cover students who have voluntarily placed themselves in a position where they have an even more diminished privacy expectation than the general student population, and; 5) where those students as a whole are likely to suffer harm from physical injury or decreased supervision if under the influence of drugs. The Tenth Circuit's decision invalidates this standard and indeed raises the bar for the hundreds, if not thousands, of local boards of

[28] *Board of Educ., Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 891 (1982) (Burger, C. J., dissenting).

education within its jurisdiction. The effects of the Tenth Circuit's decision on these boards will be disastrous and irreversible if not addressed by this Court. If school boards are required to first identify and keep a count of actual student drug users to determine if the number is "sufficient" to meet the test before they may utilize a suspicionless drug-testing program, the subsequent implementation of the program is meaningless and will be effectively eliminated as a tool to fight student drug abuse. If the implementation of a suspicionless drug-testing program becomes a meaningless tool in the Tenth Circuit, the *Vernonia* decision likewise becomes meaningless as a guide to those local boards within its jurisdiction. Even if a board of education determines to fight drug use through suspicionless drug testing and attempts to abide by the Tenth Circuit's decision, it will most likely face constitutional challenges. These challenges will necessitate the expenditure of precious dollars earmarked for the education of their children to demonstrate to the satisfaction of a court that the local board of education has met the ambiguous standard of finding an "identifiable" drug problem among a "sufficient" number of its students.

As candidly conceded by the Tenth Circuit, boards of education and courts will continue to grapple with the questions that are automatically raised from this decision[29]— When does a drug problem become "identifiable?" What type of evidence must boards of education gather to prove the problem has reached the "identifiable" stage? How many students does it take to equal a "sufficient" amount? How do boards of education know when they have reached the "sufficient" stage? Who makes these determinations?

This case is uniquely suitable to address the overall question presented since the relevant facts of the case are virtually undisputed. The Tenth Circuit's decision impermissibly raises the constitutional bar over which boards of

[29] App. A, *infra*, 27a.

education must ascend before they can validly exercise their judgment to implement a suspicionless drug-testing policy. The decision further conflicts with the holdings of this Court and of other circuit courts of appeal on this issue, further pointing to the urgent need for review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 2001

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed Mar. 21, 2001]

No. 00-6128

LINDSEY EARLS and LACEY EARLS, minors, by their next friends and parents, John David Earls and Lori Earls; DANIEL JAMES, a minor, by his friend and mother, Leta Hagar,

Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF TECUMSEH PUBLIC SCHOOL DISTRICT, Independent School District No. 92 of Pottawatomie County; TECUMSEH PUBLIC SCHOOL DISTRICT, Independent School District No. 92 of Pottawatomie County,

Defendants-Appellees.

OKLAHOMA STATE SCHOOL BOARDS ASSOCIATION; NATIONAL SCHOOL BOARDS ASSOCIATION; WASHINGTON LEGAL FOUNDATION; U.S. SENATORS JUDD GREGG and DON NICKLES; GOVERNOR FRANK KEATING; REP. FRED S. MORGAN (Oklahoma); OKLAHOMA SECONDARY SCHOOLS ACTIVITIES ASSOCIATION; ALLIED EDUCATIONAL FOUNDATION; GAYLA D. DUKE; RHONDA ELLARD; DEBRA FLETCHER; BOBBETTE HAMILTON; JIMMY and SHEILA JORDAN; MICHAEL and KIM RAWLS; STEWART and ROSHEL STABEL; KENNETH A. STANLEY; KRIS STEELE; CLYDE L. and GAIL A. TOPPING; MIKE and VALERIE TUCKER; STEVE and LYNNE YOUNG; THE AMERICAN PUBLIC HEALTH ASSOCIATION; THE NATIONAL ASSOCIATION OF SOCIAL WORKERS; THE NATIONAL ASSOCIATION OF SOCIAL

WORKERS—OKLAHOMA CHAPTER; THE CENTER FOR LAW AND EDUCATION; THE NATIONAL CENTER FOR YOUTH LAW; THE JUVENILE LAW CENTER; THE LOYOLA CHILDLAW CENTER; ADVOCATES FOR CHILDREN OF NEW YORK; LAWYERS FOR CHILDREN; COVENANT HOUSE NEW JERSEY; PROFESSOR MARTIN GUGGENHEIM & PROFESSOR RANDY HERTZ; AMERICAN ACADEMY OF PEDIATRICS,

Amici Curiae.

Appeal from the United States District Court
for the Western District Of Oklahoma
(D.C. NO. CV-99-1213-R)

Before BRORBY, ANDERSON, and EBEL, Circuit Judges.

ANDERSON, Circuit Judge.

Plaintiffs Lindsay Earls and Daniel James are students at Tecumseh High School.[1] By their next friends and parents, John David and Lori Earls and Leta Hagar, they brought this 42 U.S.C. § 1983 action against the Board of Education of the Tecumseh Public School District and the Tecumseh Public School District (collectively the "District"), challenging the constitutionality of the random suspicionless urinalysis drug testing policy which the District implemented for all students participating in competitive extracurricular activities. The district court granted summary judgment in favor of the District, concluding that the policy does not violate the Fourth Amendment's prohibition against unreasonable searches. Plaintiffs appeal that decision.

We have received three amicus briefs: one from The American Public Health Association, The National Association of Social Workers, The National Association of Social

[1] Lacey Earls was added as a plaintiff shortly before the district court issued its judgment in this case.

Workers-Oklahoma Chapter, The Center for Law and Education, The National Center for Youth Law, The Juvenile Law Center, The Loyola ChildLaw Center, Advocates for Children of New York, Lawyers for Children, Covenant House New Jersey, Professor Martin Guggenheim, Professor Randy Hertz, and the American Academy of Pediatrics, in support of plaintiffs; one from The Oklahoma State School Boards Association and The National School Boards Association, in support of the District; and one from the Washington Legal Foundation, United States Senators Judd Gregg and Don Nickles, Governor Frank Keating, Representative Fred S. Morgan, the Oklahoma Secondary Schools Activities Association, the Allied Educational Foundation, Gayla D. Duke, Rhonda Ellard, Debra Fletcher, Bobbette Hamilton, Jimmy and Sheila Jordan, Michael and Kim Rawls, Stewart and Roshel Stabel, Kenneth A. Stanley, Kris Steele, Clyde L. and Gail A. Topping, Mike and Valerie Tucker, and Steve and Lynne Young, in favor of the District.

Because we conclude that the policy violates the Fourth Amendment, we reverse and remand this case.

BACKGROUND

Tecumseh High School has for many years offered a variety of extracurricular activities for students interested in participating therein. Such activities have included the choir, band, color guard, Future Farmers of America ("FFA"), Future Homemakers of America ("FHA"), and the academic team. Additionally, it has also sponsored athletic teams, cheerleaders and Pom Pon.[2] "The vast majority of students participate in one or more school-sponsored activities." *Earls v. Bd. of Educ.*, 115 F. Supp. 2d 1281, 1282 (W.D. Okla. 2000).

[2] The drug testing policy itself and the district court's opinion both describe this activity as Pom Pon. We accordingly refer to it that way in this opinion.

On September 14, 1998, the District adopted the Student Activities Drug Testing Policy (the "Policy") requiring drug testing of all students who participate "in any extra-curricular activity such as FFA, FHA, Academic Team, Band, Vocal, Pom Pon, Cheerleader and Athletics." Tecumseh Public Schools Student Activities Drug-testing Policy at 2, Appellants' App. Vol. I at 107. Each student seeking to participate in such activities must sign a written consent agreeing to submit to drug testing prior to participating in the activity, randomly during the year while participating, and at any time while participating upon reasonable suspicion. The test detects amphetamines, cannabinoid metabolites (marijuana), cocaine, opiates, barbiturates and benzodiazepines. It does not detect alcohol or nicotine. Students subject to the Policy must pay a yearly fee of four dollars. Although the Policy does not expressly so state, it is undisputed that the Policy has in fact only been applied to those extracurricular activities involving some aspect of competition and which are sanctioned by the Oklahoma Secondary Schools Activity Association ("OSSAA").

The district court described the actual drug testing process as follows, which the parties do not dispute:

> [T]he students to be tested are called out of class in groups of two or three. The students are directed to a restroom, where a faculty member serves as a monitor. The monitor waits outside the closed restroom stall for the student to produce the sample. The monitor pours the contents of the vial into two bottles. Together, the faculty monitor and the student seal the bottles. The student is given a form to sign, which is placed, along with the filled bottles, into a mailing pouch in the presence of the student. Random drug testing was conducted in this manner on approximately eight occasions during the 1998/1999 school year. Approximately twenty students were tested each time.

Earls, 115 F. Supp. 2d at 1290-91. At the time of the testing, the monitor also gives each student a form on which he or she may list any medications legally prescribed for the student. According to the Policy, "[t]he medication list shall be submitted to the lab in a sealed and confidential envelope and shall not be viewed by district employees." Policy at 5, Appellants' App. Vol. I at 110.

The results of the drug tests are placed in confidential files separate from the students' other educational files. They "shall be disclosed only to those school personnel who have a need to know, and will not be turned over to any law enforcement authorities." *Id.* Students who refuse to submit to the drug testing under the Policy are prohibited from participating in any extracurricular activities. There are no academic sanctions imposed.

Plaintiff Lindsay Earls is a member of the show choir, the marching band and the academic team. Plaintiff Daniel James apparently seeks to participate in the academic team and was enrolled during the 1999-2000 school year in the academic team class. They and their parents challenge the application of the Policy to them as a condition to their participation in those activities. Plaintiffs do not challenge the policy as it applies to athletes.

DISCUSSION

We review de novo the district court's grant of summary judgment. *Phelan v. Laramie County Cmty. Coll. Bd. of Trs.*, 235 F.3d 1243, 1246 (10th Cir. 2000). Accordingly, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When we apply this standard, we examine the record and any reasonable inferences drawn therefrom in the light most

favorable to the non-moving party. *19 Solid Waste Dept. Mechs. v. City of Albuquerque*, 156 F.3d 1068, 1071 (10th Cir.1998).

The Fourth Amendment ordinarily requires "some quantum of individualized suspicion" before a search may constitutionally proceed. *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976). However, the Supreme Court has recognized that "the Fourth Amendment imposes no irreducible requirement of such suspicion." *Id.* at 561. Rather, "the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 652 (1995). The Court has further held that the "state-compelled collection and testing of urine" is a search subject to the Fourth Amendment's reasonableness requirement. *Id.* (citing *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 617 (1989)).

Because we are presented in this case with a Fourth Amendment search of school children while at school, we first examine the general nature of the rights and obligations of students and school personnel in the school setting. It is "indisputable . . . that the Fourteenth Amendment protects the rights of students against encroachment by public school officials." *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985). As state actors, therefore, school personnel "do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies." *Id.* at 336. However, while school authorities do not act merely *in loco parentis* when interacting with students, the Court has made it clear that their power over students is "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." *Vernonia*, 515 U.S. at 655. Thus, while students retain their Fourth Amendment right to be free from unreasonable searches while at school, the nature of that right is different-it "is what is appropriate for children

in school." *Id.* at 656. It is in this unique environment that we examine the constitutionality of the Policy.

The District justifies the Policy based on the "special needs" doctrine, which the Supreme Court has developed through a series of cases permitting suspicionless drug testing in certain situations. In *Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602 (1989), the Court upheld the suspicionless drug testing of railroad employees who had been involved in accidents. It explained the "special needs" doctrine as follows:

> We have recognized exceptions to . . . [the warrant requirement] when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.
>
> When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.

Id. at 619 (quotations omitted). Accordingly, under the special needs doctrine, the Court identifies a special need which makes impracticable adherence to the warrant and probable cause requirements, then balances the government's interest in conducting the particular search against the individual's privacy interests upon which the search intrudes.

Employing that analysis, in *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), the Court upheld Customs Service regulations requiring suspicionless drug testing for Customs Service employees seeking positions involving the interdiction of illegal drugs or requiring the carrying of firearms. In *Vernonia*, again invoking the special needs doctrine, the Court upheld the suspicionless drug testing of student athletes at a high school and middle school. Finally, in *Chandler v. Miller*, 520 U.S. 305 (1997), finding that Georgia had failed to demonstrate a "special need"

justifying the particular search at issue, the Court held unconstitutional a Georgia statute requiring candidates for certain public offices to certify that they had taken a urinalysis test within thirty days prior to qualifying for nomination or election and that the test was negative.

Chandler was the first case in which the Court found the government failed to demonstrate a special need. Our court has recently held that in *Chandler*, "the Court added a step to the analysis it had followed in *Skinner*, *Von Raab*, and [*Vernonia*]." *19 Solid Waste Dept. Mechs.*, 156 F.2d at 1072. We held that *Chandler* requires courts to inquire first into whether the government has established the existence of a special need before proceeding to any balancing of government and private interests. We defined that inquiry as two-fold: first, "whether the proffered governmental concerns were 'real' by asking whether the testing program was adopted in response to a documented drug abuse problem or whether drug abuse among the target group would pose a serious danger to the public"; and second, "whether the testing scheme met the related goals of detection and deterrence." *Id.* at 1073. These special needs cases provide the parameters for our analysis.[3]

The parties argue vigorously over which of these cases should primarily guide our decision in this case. Plaintiffs argue that *Chandler*, as interpreted by our court in *19 Solid Waste Mechs.*, governs and compels the conclusion that the District has failed to establish the existence of a special need. They argue that the existence of a special need is a threshold test; the District has failed to demonstrate such a need because it has failed to show that a drug problem exists among the tested group; and we therefore need not even reach

[3] The Supreme Court's special needs cases have engendered some criticism for failing to adequately define what a special need is. *See, e.g.*, Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C.L. Rev. 258, 261 (Winter 2000).

the balancing analysis. However, they argue, were we to reach the balancing analysis, we would still conclude that the Policy is unconstitutional.

The District responds that *Vernonia* remains the authoritative guide for a case such as this involving an allegation of special need for a suspicionless search in a public school environment. It argues that a special need exists because the District did in fact demonstrate the existence of a drug problem at the school. Further, the balancing analysis would compel the conclusion that the Policy is constitutional.

We begin by noting that, while there may indeed be some confusion as to the application of the special needs doctrine in other settings, we deal here with the unique environment of the school setting. Thus, we take *Vernonia*, the only Supreme Court case involving suspicionless drug testing of a group of students at a public school, as the primary guide for our analysis of this case. As the Supreme Court explicitly stated in *Vernonia*, "[w] e have found . . . 'special needs' to exist in the public school context," where adherence to the traditional Fourth Amendment requirements of a warrant and probable cause "'would unduly interfere with the maintenance of swift and informal disciplinary procedures [that are] needed,'" and would undermine "'the substantial need of teachers and administrators for freedom to maintain order in the schools.'" *Vernonia*, 515 U.S. at 653 (quoting T.L.O., 469 U.S. at 340-41). Whether or not the Supreme Court has raised the special need bar in other contexts, we must assume, until the Court directs us otherwise, that its analysis in *Vernonia* governs our analysis in this case. Thus, we agree that the District has demonstrated that there is a special need for a relaxation of the Fourth Amendment's standards in this case, and conclude that the constitutionality of the Policy will be determined by balancing the factors set forth in *Vernonia*.[4]

[4] Were we to agree with the plaintiffs that *Chandler* and *19 Solid Waste Mechs.* have raised the special need bar in all cases, including those

See Gruenke v. Seip, 225 F.3d 290, 300-01 (3d Cir. 2000) ("[I]n other circumstances, there may be 'special needs' that make probable cause impracticable. The public school context is one of those settings."). We turn, therefore, to an examination of *Vernonia*.

Significantly, the Court in *Vernonia* began its opinion by describing the serious drug problem which had developed in the Vernonia schools. While drugs had not previously been a major problem, '[i]n the mid-to-late 1980's . . . teachers and administrators observed a sharp increase in drug use." *Vernonia*, 515 U.S. at 648. "Along with more drugs came more disciplinary problems." *Id.* Moreover, "athletes were the leaders of the drug culture." *Id.* at 649. The Court adopted the following district court findings:

> [T]he administration was at its wits end and . . . a large segment of the student body, particularly those involved

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involving public school contexts, we would still conclude that the District has demonstrated the existence of a special need.

As we stated in *19 Solid Waste Mechs.*, the *Chandler* Court in addressing the special need inquiry first "examined whether the proffered governmental concerns were 'real' by asking whether the testing program was adopted in response to a documented drug abuse problem or whether drug abuse among the target group would pose a serious danger to the public." *19 Solid Waste Mechs.*, 156 F.3d at 1073. Just as with Customs Service employees in *Von Raab*, the Court in *Chandler*, and our court in *19 Solid Waste Mechs.*, recognized that, even without a documented drug abuse problem, the potential danger of drug abuse among the target group may be sufficient to establish the existence of a special need. While drug abuse among a large portion of a school student body does not present the same kind of public safety danger as the Court surmised drug abuse among certain Customs Service employees could, it nonetheless would undeniably be a serious societal problem. Thus, we think a school concerned about drug abuse among its students has adequately demonstrated the existence of a special need. Of course, once a special need has been demonstrated, we must then balance the government's (in this case, the school's) interest in conducting the particular search in question against the privacy interests of those subject to the search.

> in interscholastic athletics, was in a state of rebellion. Disciplinary actions had reached "epidemic proportions." The coincidence of an almost threefold increase in classroom disruptions and disciplinary reports along with the staff's direct observations of students using drugs or glamorizing drug and alcohol use led the administration to the inescapable conclusion that the rebellion was being fueled by alcohol and drug abuse as well as the student's misperceptions about the drug culture.

Id.[5] Faced with this indisputably serious and widespread drug problem, the Vernonia schools adopted a suspicionless drug testing policy. The policy, which was administered in a manner very similar to the Policy in our case, applied to all students participating in interscholastic athletics.

The Court then reviewed its special needs doctrine, and stated, without more, "[w]e have found such 'special needs' to exist in the public school context." *Id.* at 653.[6] The Court proceeded to consider the various factors relevant to the required balancing of the search's "intrusion on the individual's Fourth Amendment interests against its

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[5] Although Justice O'Connor's dissent in *Vernonia* questioned the sufficiency of the evidence in the record of a drug problem at the Vernonia middle school which the plaintiff attended when he filed suit against the school district, the majority's opinion adopts and relies upon the district court's findings about a serious drug problem in the Vernonia high schools. One cannot read the majority opinion and not appreciate that those factual findings regarding the existence of a documented drug problem among students subject to the drug testing were very important to the majority.

[6] What is unclear from a simple reading of *Vernonia* is whether the Court's finding of a special need was based upon the school setting alone, with the concomitant need for school officials to maintain order and discipline, yet fulfill their tutelary and custodial obligations, or whether it was based upon that need in conjunction with the documented serious drug problem at the Vernonia schools.

promotion of legitimate governmental interests." *Id.* (quoting *Skinner*, 489 U.S. at 619).

The Court explained that "[t]he first factor to be considered is the nature of the privacy interest upon which the search . . . intrudes." *Id.* at 654. The Court reiterated the primacy of the school setting: "[c]entral, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster." *Id.* As such, students "have a lesser expectation of privacy than members of the population generally." *Id.* at 657 (quoting *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring)). Student athletes have an even lower expectation of privacy because, in addition to enjoying a lesser degree of physical privacy in athletic locker rooms, the Court analogized student athletes to adults working in closely regulated industries who "have reason to expect intrusions upon normal rights and privileges, including privacy." *Id.*[7]

The Court then considered the character of the particular intrusion involved. After concluding that the physical process by which urine was collected for the drug testing was under conditions "nearly identical to those typically encountered in public restrooms," *id.* at 658, and therefore relatively unintrusive, the Court also examined whether the testing was unduly intrusive because of the information it disclosed about the individual's body. It determined that it was minimally intrusive in that regard because the test only revealed the existence of drugs, not medical or other physical conditions, the tests were all standardized, and the information revealed was disclosed only to those school personnel having a need to know, not to law enforcement or others within the school community. The Court also assumed that information about

[7] The Court cited *Skinner*, in which a factor favoring suspicionless drug testing of railroad employees was the fact that such employees already worked in "an industry that is regulated pervasively to ensure safety." 489 U.S. at 627.

prescription medications the student was compelled to reveal was kept confidential. Thus, the Court concluded the "invasion of privacy was not significant." *Id.* at 660.

Last, the Court examined the "nature and immediacy of the governmental concern at issue." *Id.* It noted more generally the importance of deterring drug use among schoolchildren, particularly given that the "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe," and that "the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted." *Id.* at 661-62. Additionally, the Court noted that the testing policy at issue was not just directed at students in general, but, more narrowly, student athletes "where the risk of immediate physical harm to the drug user or those with whom he is playing is particularly high." *Id.* at 662. Moreover, the "particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes." *Id.*

As to the immediacy of the District's concerns, the Court stated, "we could not possibly find clearly erroneous the District Court's conclusion that 'a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion,' that '[d]isciplinary actions had reached "epidemic proportions,"' and that 'the rebellion was being fueled by alcohol and drug abuse as well as by the student's misperceptions about the drug culture." *Id.* at 662-63. The Court characterized the problem as an "immediate crisis" of greater magnitude than that involved in either *Skinner* or *Von Raab*. And the Court concluded the District's solution to that crisis-drug testing student athletes-was self-evidently efficacious: "a drug problem largely fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs." *Id.* at 663.

Accordingly, after carefully considering all the factors discussed above, the Court upheld the Vernonia schools' drug testing policy. It emphasized two factors in particular: that the testing policy "was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care"; and that the district had demonstrated a severe need for the testing. *Id.* at 665.

Applying those factors to the Policy in this case, we reach a different conclusion. We first note that the evidence of drug use among those subject to the Policy is far from the "epidemic" and "immediate crisis" faced by the Vernonia schools and emphasized by the Supreme Court's opinion. The district court in this case admitted as much: "[a]dmittedly the evidence in this case does not show an epidemic of illegal drug use in the Tecumseh School District." *Earls*, 115 F. Supp. 2d at 1285. Rather, the evidence of actual drug usage, particularly among the tested students, is minimal: Dean Rogers, the president of the school board, testified that in 1999, a member of FFA was found with drug paraphernalia in his car. Appellants' App. Vol. I at 120, 137-38. She further testified that in 1990 or 1991, a student apparently under the influence of some substance was injured when a steer he was handling got loose, although it is unclear from her testimony whether this occurred during an FFA activity. *Id.* at 119-21. Principal James Blue testified that in the "many" years he had been principal of Tecumseh High School, there had been no alcohol or drug-related injuries or deaths. *Id.* at 162. Ms. Rogers also testified that in 1997 or 1998, she overheard a boy in FFA invite some other boys over to his house where "there would be plenty of smokes." *Id.* at 134.

Carolyn Daugherty, the vocal music teacher and choir director, testified that she had never caught a choir member using illegal drugs, Appellants' App. Vol. II at 286; that she has had students tell her they thought some other student was

using drugs, *id.* at 287; that she suspected some students were using some substance because "appearance wise their eyes looked dilated [and] [t]hey looked spaced out," *id.*; that she had referred one student to the office for suspected drug use during her twenty-nine years of teaching, *id.* at 289; that she did not recall ever telling the school board that choir members had a drug problem, *id.* at 290; that a choir member was caught six or seven years previously bringing alcohol concealed in a cough syrup bottle on a trip, *id.* at 292; and that, in her opinion, most of her choir students do not use drugs. *Id.* at 302.

Teacher Sheila Evans testified that she did not think that any of her students in FHA who competed used drugs. Appellants' App. Vol. III at 673. Teacher Danny Sterling testified that during the preceding five years, he had talked to the principal three to four times about some student in one of his classes that he suspected was using drugs. *Id.* at 711. One time he "actually smelt the aroma of pot." *Id.* at 712. He further testified that he estimates he sees ten students per year whom he believes are on drugs. None of these students competed with FFA. He testified that he believed that students in FFA were less likely to use drugs than students who were not so involved. *Id.* at 713.

Danny Jacobs, the assistant superintendent, testified that 243 students were tested under the Policy during the 1998-99 school year, and of those students, three tested positive, two high school students and one middle school student. Appellants' App. Vol. II at 408-09. He further testified that approximately 241 students were tested in the 1999-2000 school year, and one tested positive. *Id.* Principal James Blue testified that, with respect to the two high school students who tested positive, one was involved in wrestling and FFA and one was involved in baseball and FFA. Appellants' App. Vol. III at 570. Grant Gower testified that the student who tested positive in the 1999-2000 year played softball. *Id.* at 656-57.

In response to interrogatories, the District provided information that in the 1998-99 year, 208 students participated in FFA, 119 in FHA, 70 in Band, 14 in Academic Team and 75 in Vocal Music. *Id.* at 737. In the first semester of the 1999-2000 school year, 100 participated in FFA, 63 in FHA, 67 in Band, 16 in Academic Team and 65 in Vocal Music. *Id.* at 737-38.[8] Thus, in the 1998-99 year, of the 486 students who participated in the five listed extracurricular activities, two students, both also athletes, tested positive. And of the 311 students participating in extracurricular activities the first semester of the 19992000 year, only one student, apparently an athlete and not involved in any of the listed extracurricular activities, tested positive.

The record also contains photocopies of disciplinary referrals at the high school. Some contain no date indicating the year in which the incident occurred. Of the twenty incidents occurring over an unspecified period of time, thirteen resulted from a drug dog "hitting" or showing an interest in the student, or his or her vehicle or locker. One involved possession of marijuana. The remainder involved possession of or suspected consumption of alcohol. *Id.* at 633-51. There is no evidence as to whether any of the students given these disciplinary referrals were involved in extracurricular activities. Similarly, in its response to interrogatories, the District listed occasions when students received counseling for use of drugs or talked to counselors concerning drug usage. The circumstances and details surrounding these incidents do not appear to have been developed more fully with additional evidence, nor is there

[8] These are figures for the high school only. Figures for middle school participation were also included. In its response to interrogatories the District also listed various incidents involving sixth, seventh and eighth grade students and drugs. However, virtually all the evidence presented in this case through depositions related to the high school, where the plaintiffs were students. The district court's opinion likewise refers only to evidence involving the high school.

any indication that any of the students, at least at the high school level, were involved in extracurricular activities.

In its yearly application for funds under the Safe and Drug-Free Schools and Communities program, the District submitted a statement called an "analysis of current use." In the application for the 1995-96 year, the District stated, "[t]he use of the surveys have provided us with information concerning alcohol as our number one problem. Our students express that the main use is alcohol on the weekends. We have not found other types of illegal or controlled substances to be a major problem although they do exist." *Id.* at 806. Similarly, the 1996-97 application stated, "[t]he use of tobacco and alcohol continue to be our number one problems. Our students utilize that alcohol primarily on the weekends and use tobacco, especially smokeless tobacco, on a more regular basis. Other types of drugs including, controlled dangerous substances, are present but have not identified themselves as major problems at this time." *Id.* at 809. The application for the 1998-99 year contained a virtually identical statement. *Id.* at 813. Mr. Jacobs testified that the forms contained accurate information. Appellants' App. Vol. II at 366.

The District points to other instances of alleged drug usage to bolster its argument that there was a serious drug problem at the Tecumseh schools. Several of these instances occurred in the early 1970's. Many are based upon hearsay, or are virtually anecdotal. Except for the specific instances discussed above, none relate to students who are involved in the extracurricular activities to which the Policy applies.[9]

[9] For example, the District recites the following evidence of drug usage:

1. Fourteen instances of drug usage by District students known to the President of the District Board.

> 2. Injuries which have occurred to students and members of the public by District students engaged in Competitive Activities under the influence of drugs
>
> . . . .
>
> 6. Students enrolled in classes associated with Competitive Activities have been caught with or disciplined for drugs in the last four years.
>
> . . . .

Appellees' Brief in Chief at 5-6.

Some of these assertions involve distortions of the record in this case. For instance, the "fourteen instances of drug usage" known to Dean Rogers include the following: in 1970, her daughter told her that an unidentified boy on the school bus had offered her some pills, Appellants' App. Vol. II at 521; in 1978, one of her son's unidentified friends on the football team left a bag with drug paraphernalia in it at her house, *id.* in 1979, her son told her of "parties" he went to at which marijuana was smoked, Appellants' App. Vol. I at 127-28; in 1980, "[o]ne of the boys that ran with [her] son" was stopped and marijuana was found in his car, *id.* at 128-29; her daughter told her in 1972 or 1973 that the boyfriend of the girl with whom she shared a locker sold drugs, *id.* at 117; sometime in the middle 1980s a meter reader found some marijuana near the meter at what is now a junior high school, Appellants' App. Vol. II at 524; in the 1980s her grandson told her that an unidentified student had a marijuana cigarette at school, *id.* at 526; in the 1990s her grandson told her he attended a party and the girlfriend of a friend found her mother's marijuana and passed it around, *id.* at 527; the 1998 incident discussed above in which she overheard a boy in FFA invite other boys to a party at which "there would plenty of smokes," *id.* at 529; in the 1997-98 school year, her granddaughter told her that an unidentified boy "was bombed out and the teacher ask[ed] him if he was all right," *id.* at 530; in the 1997-98 year, a student not involved in any extracurricular activities was found to have marijuana in his car, *id.* at 5 51; the 1999 incident discussed above in which an FFA student was found with drug paraphernalia in his car. *Id.*

The reference to injuries to students and members of the public is to the incident in 1990 or 1991 when a steer got loose from a student under the influence of some substance, injuring himself and one other person. *Id.* at 476-77.

The record reference to the statement that "students enrolled in classes associated with Competitive Activities have been caught with or disciplined for drugs in the last four years" is a response to an interrogatory in

In sum, while there was clearly some drug use at the Tecumseh schools, such use among students subject to the testing Policy was negligible. It was vastly different from the epidemic of drug use and discipline problems among the very group subject to testing in *Vernonia*. With that in mind, we balance the privacy interests of the students against the District's interest in testing students pursuant to the Policy.

I. Nature of Privacy Interest

As in *Vernonia*, we first consider the "nature of the privacy interest upon which the search here at issue intrudes." *Vernonia*, 515 U.S. at 654. It is well established that, while students do not "shed their constitutional rights . . . at the schoolhouse gate," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), "students within the school environment have a lesser expectation of privacy than members of the population generally." *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring). The Court in *Vernonia* found student athletes have an even lesser expectation of privacy than other students, both because of a perceived "'communal undress' inherent in athletic participation," *Vernonia*, 515 U.S. at 657 (quoting *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1318 (1988)), and because athletes, simply by participating on the team, voluntarily subject themselves to increased supervision and additional obligations.

The District argues that participants in the extra-curricular activities subject to testing under the Policy, like athletes, have a reduced expectation of privacy because: (1) they voluntarily participate; (2) they occasionally travel out of

which the District stated that Principal Blue "can testify that students enrolled in FFA, FHA and Athletics have been caught with drugs or disciplined for drugs." Appellants' App. Vol. III at 738. As indicated above, however, Principal Blue actually testified that, of the three high school students who tested positive under the Policy, all three were athletes and two were involved in FFA.

town on trips where they must sleep together in communal settings and use communal bathrooms; and (3) they agree to abide by "the higher degree of academic and out-of-school rules and regulations of both the District and the OSSAA." Appellees' Brief in Chief at 17. While it is probably true that the degree of "communal undress" associated with most of the extracurricular activities in this case is different from the level of "communal undress" among athletes envisioned by the Supreme Court in *Vernonia*, we decline to give that difference, whatever it may be, much weight in our analysis. We doubt that the Court intends that the level of privacy expectation depends upon the degree to which particular students, or groups of students, dress or shower together or, on occasion, share sleeping or bathroom facilities while on occasional out-of-town trips.[10]

More significant tc us is the fact that, like athletes, students participating in other extracurricular activities voluntarily submit themselves to at least some additional requirements and obligations.[11] We examine first whether the voluntariness of the participation in the activity reduces a student's legitimate expectation of privacy while participating in that activity.

We do not believe that voluntary participation in an activity, without more, should reduce a student's, expectation of privacy in his or her body. Members of our society voluntarily engage in a variety of activities every day, and do not thereby suffer a reduction in their constitutional rights. As another court recently stated, "we disagree [with the view]

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[10] Moreover, there was evidence in this case that not all athletes "shower[] and chang[e]" together after each event. *Vernonia*, 515 U.S. at 657. *See* Appellants' App. Vol. 11 at 380.

[11] The District Superintendent, Tom Wilsie, submitted an affidavit in which he stated that students wishing to participate in OSSAA sanctioned activities, like the extracurricular activities at issue in this case, "must meet scholastic standards in order to be eligible to participate." Wilsie Aff. at ¶ 5, Appellants' App. Vol. I at 78.

that just by exercising a privilege in any activity that is part of the educational process, a student's privacy interests are lessened and that a school district can, without more, condition participation in that activity on agreeing to testing just because the activities are optional." *Theodore v. Del. Valley Sch. Dist.*, 761 A.2d 652, 660 (Pa. Commw. Ct. 2000). Moreover, while participation in extracurricular activities is voluntary, such participation has become an integral part of the educational experience for most students. The Supreme Court recently cautioned against "minimiz[ing] the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience." *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266, 2280 (2000); *see also Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1109 (Colo. 1998) ("the reality for many students who wish to pursue post-secondary educational training and/or professional vocations requiring experience garnered only by participating in extracurricular activities is that they must engage in such activities . . . . [I]nvolvement in a school's extracurricular offerings is a vital adjunct to the educational experience."). Thus, the voluntariness of the participation, without more, does not reduce a student's expectation of privacy.

However, there are other aspects of participating in extracurricular activities which do legitimately lower a student's expectation of privacy. While students participating in non-athletic extracurricular activities need not obtain preparticipation physicals or insurance, as athletes must, they do, like athletes, agree to follow the directives and adhere to the rules set out by the coach or other director of the activity. This inevitably requires that their personal freedom to conduct themselves is, in some small way, constrained at least some of the time. We therefore conclude that, like athletes, participants in other extracurricular activities have a somewhat lesser privacy expectation than other students.

II. Character of Intrusion

We turn next to "the character of the intrusion that is complained of." *Vernonia*, 515 U.S. at 658. Because the manner of testing, the information obtained, and the use to which that information is put are, in this case, virtually identical to the testing process in *Vernonia*, we reach the same conclusion as did the Supreme Court: "the invasion of privacy was not significant." *Id.* at 660.

III. Nature and Immediacy of Concern and Efficacy of Solution

The final factor we consider is "the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it." *Id.* This factor tips the balancing analysis decidedly in favor of the plaintiffs.

As the Court acknowledged in *Vernonia*, there can be no doubt that the District's interest in deterring drug use among students is very important, "perhaps compelling." *Id.* at 661. However, in addition to noting the general danger to children of drug abuse, the Court in *Vernonia* emphasized the particular danger to athletes caused by drug usage:

> the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high. Apart from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes.

Id. at 662. The District argues that students engaged in extracurricular activities are equally at risk of physical harm, both to themselves and others, because, for example, band members perform routines with heavy instruments and FFA members at times wrestle large animals. Furthermore, the District argues, participants in competitive extracurricular activities, like athletes, often practice or prepare for

competitions after school and on weekends, and travel on occasional overnight trips, where they are subject to less supervision than regular students.

This argument proves both too much and too little. While there may indeed be some extracurricular activities that involve a safety issue comparable to that of athletes, there are other students involved in extracurricular activities and therefore subject to the Policy who can hardly be considered a safety risk. It is difficult to imagine how participants in vocal choir, or the academic team, or even the FHA are in physical danger if they compete in those activities while using drugs, any more than any student is at risk simply from using drugs. On the other hand, there are students who are not subject to the testing Policy but who engage in activities in connection with school, such as working with shop equipment or laboratories, which involve a measurable safety risk. Thus, safety cannot be the sole justification for testing all students in competitive extracurricular activities, because the Policy, from a safety perspective, tests both too many students and too few. In essence, it too often simply tests the wrong students.[12]

Perhaps recognizing this dilemma, the District relies more heavily on the fact that all extracurricular students are subject to less supervision than students in classrooms when they are staying after school to meet and/or practice, and when they are traveling off campus to compete. However, if this provides the justification for testing, then again there is an imperfect match between the need to test and the group tested. Students who do not participate in any extracurricular activities are, at times, less supervised than they are in the

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[12] To the extent one could argue that the safety issue here is the health. care risk of addiction or physical harm from the use of drugs, then the logical solution is to test all students. The fact that the District only tests a select group of students-those participating in extracurricular activities-indicates that its testing Policy is not motivated simply by health care concerns.

classroom-when they are in the hallways between classes, at lunch, immediately before and after school while they are entering and leaving school premises.

Moreover, Ms. Rogers testified that there are other student organizations and groups which take field trips, meet after school, and otherwise engage in precisely the same kinds of less supervised activities as those in the extracurricular activities subject to drug testing under the Policy. Appellants' App. Vol. II at 480-82, 560-61. The District admitted in a response to an interrogatory that other groups, not subject to the Policy, have traveled overnight. Appellants' App. Vol. III at 739. Accordingly, neither a concern for safety nor a concern about the degree of supervision provides a sufficient reason for testing the particular students whom the District chose to test under the Policy.

Additionally, given the paucity of evidence of an actual drug abuse problem among those subject to the Policy, the immediacy of the District's concern is greatly diminished. And, without a demonstrated drug abuse problem among the group being tested, the efficacy of the District's solution to its perceived problem is similarly greatly diminished. While the Court in *Vernonia* had no trouble identifying the efficacy of a drug testing policy for athletes when the athletes were at the heart of the drug problem, we see little efficacy in a drug testing policy which tests students among whom there is no measurable drug problem. *See Trinidad Sch. Dist. No. 1*, 963 P.2d at 1110 (holding that the school district failed to demonstrate the efficacy of its testing policy because it "swept within its reach students participating in an extracurricular activity who were not demonstrated to play a role in promoting drugs and for whom there was no demonstrated risk of physical injury").

In sum, applying the factors identified by the Supreme Court in *Vernonia*, we conclude that the testing Policy is

unconstitutional. We do not suggest that a school must wait until it can identify a drug abuse problem of epidemic proportions before it may drug test groups of its students. Nor do we declare any bright line mark concerning the magnitude at which a drug problem becomes severe enough to warrant a suspicionless drug testing policy. We leave that to each school district. However, any district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem.[13] "[S]pecial needs must rest on demonstrated realities." *United Teachers of New Orleans v. Orleans Parish Sch. Bd.*, 142 F.3d 853, 857 (5th Cir. 1998). Unless a district is required to demonstrate such a problem, there is no limit on what students a school may randomly and without suspicion test. Without any limitation, schools could test all of their students simply as a condition of attending school. The District admits it could not test its entire student body and we doubt very much that the Supreme Court would permit such broad testing were the issue presented to it.

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[13] As the court in *Theodore* put it:

> While the purposes articulated set forth a governmental interest supporting a generalized drug and alcohol testing program, no reason is given for a special need to test only those students who engage in optional activities . . . more than the general student population. To carry out the health care a*nalogy, it would be as if the School* District was offering a polio vaccine only to those students engaged in extracurricular activities . . . without expressing a need as to why those students are more likely to contract polio or more likely to cause the spread of disease than any other selective group of students.

Theodore, 761 A.2d at 661.

In reaching this result, we realize that we are disagreeing with two of our fellow circuits.[14] However,

[14] In *Todd v. Rush County Schs.*, 133 F.3d 984 (7th Cir. 1998), the Seventh Circuit upheld the random suspicionless drug testing of high school students participating in extracurricular activities and driving to and from school. The court did so, however, with a scant and conclusory analysis: "we find that the reasoning compelling drug testing of athletes also applies to testing of students involved in extracurricular activities. Certainly successful extracurricular activities require healthy students." *Id.* at 986. The court also noted that participation in extracurricular activities is a privilege in which students have voluntarily chosen to participate. Rehearing en banc was denied, with written dissents by four judges. *Todd v. Rush County Schs.*, 139 F.3d 571 (7th Cir. 1998).

The Seventh Circuit then held unconstitutional a policy of drug testing any student who was suspended or violated specified rules in *Willis v. Anderson Comm. Sch. Corp.*, 158 F.3d 415 (7th Cir. 1998). Rather than making a conclusory determination, as in *Todd*, the *Willis* court carefully surveyed the Supreme Court case law and each factor set forth in *Vernonia*.

Most recently, in *Joy v. Penn-Harris Madison Sch. Corp.*, 212 F.3d 1052 (7th Cir. 2000), the Seventh Circuit again upheld the random suspicionless drug testing of students involved in extracurricular activities and driving to and from school, but it did so clearly only because it was bound under the doctrines of stare decisis and precedent to follow *Todd*. The court made it clear that, were it not so bound, it would find the policy unconstitutional under a careful and thorough application of the *Vernonia* factors.

The Eighth Circuit, in a decision subsequently vacated as moot, also upheld a suspicionless drug testing policy applicable to students participating in extracurricular activities. *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999). In applying the *Vernonia* factors, the court was untroubled by the fact that the school had presented no evidence of an actual drug problem. The court simply took judicial notice of the seriousness of drug and alcohol abuse in public schools.

By contrast, the Colorado Supreme Court held unconstitutional the suspicionless drug testing of all participants in the marching band. *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095 (Colo. 1998). After applying all the *Vernonia* factors, the court concluded that "the nature of

there are other courts with which we are in agreement. This issue is obviously a difficult one with which courts will continue to grapple.

CONCLUSION

For the foregoing reasons, we REVERSE and REMAND this matter to the district court for further proceedings consistent herewith.

the privacy interest invaded was different from that of the student athletes in *Vernonia*" and, although the district established it had a drug abuse problem, "the means chosen to deal with that problem were too broad." *Id.* at 1110; *see also Linke v. Northwestern Sch. Corp.*, 734 N.E. 2d 252 (Ind. Ct. App. 2000) (holding unconstitutional under the Indiana Constitution a suspicionless drug testing policy applicable to athletes and others involved in certain extracurricular activities); *Theodore v. Del. Valley Sch. Dist.*, 761 A.2d 652 (Pa. Commw. Ct. 2000) (holding unconstitutional a suspicionless drug testing policy applicable to those participating in extracurricular activities and driving to school).

Two district court cases within the Fifth Circuit have addressed this issue. In *Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 730 F. Supp. 759 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991), a pre-*Vernonia* case, the court held unconstitutional suspicionless drug testing of students wishing to participate in extracurricular activities. The court held the testing was intrusive, there was no evidence of a drug problem or greater safety risk among those subject to the test, and the policy was "not likely to accomplish its ostensible goals." *Id.* at 765. The Fifth Circuit affirmed that decision without an opinion.

The Fifth Circuit will have an opportunity to revisit this issue, because another Texas district court has recently held unconstitutional the random suspicionless drug testing of all students participating in extracurricular activities. *Gardner v. Tulia Indep. Sch. Dist.*, No. 2:97-CV-020-J (N.D. Tex. filed Dec. 7, 2000). The school district has appealed the case to the Fifth Circuit. The court in *Gardner*, after noting that there was no evidence of a drug problem among students in general at the Tulia schools or among those participating in extracurricular activities and therefore subject to testing, held that *Vernonia* "was limited to random drug testing of the student athletes." Slip op. at 8; *see also Tannahill v. Lockney Indep. Sch. Dist.*, No. 5:00-CV-0073-C (N.D. Tex. filed March 1, 2001) (holding unconstitutional a drug testing policy applicable to all students).

EBEL, Circuit Judge, dissenting

I respectfully dissent from the panel's decision in this difficult case. Although I agree with many of the standards articulated by the majority in its opinion, I am unconvinced that the majority has actually followed those standards in reaching its final conclusion.

1. *Special Needs Analysis*

I agree with the majority that, under *Vernonia School District v. Acton,* 515 U.S. 646 (1995), a public school district need not demonstrate a particularized "special need" to randomly test students engaged in extracurricular activities for illegal drug use.[1] The "special needs" test, which is used in non-school settings to justify suspicionless searches, is dispensed with (or deemed satisfied) in a school setting because of the following, uniquely school-related considerations.

First, drugs are a particularly serious problem in our public schools, not just because of alarming rates of drug usage among school-age children,[2] but also both because young

[1] The *Vernonia* Court did not even discuss the special needs doctrine before moving ahead to the balancing portion of its analysis.

[2] One study indicates that, of children between the ages of twelve and seventeen, 18.7 percent report having used marijuana or hashish in their lifetimes. In addition, 2.4 percent report having used cocaine, 5.7 percent report having used hallucinogens, and 9.1 percent admit to having used inhalants. *See* Substance Abuse and Mental Health Services Administration, *1999 National Household Survey on Drug Abuse: Appendix G (Table G.7), available at http://www.samhsa.gov/oas/NHSDA/1999/Appendixg.htm* (last visited March 8, 2001). Furthermore, 10.9 percent of children age twelve to seventeen reported current (within thirty days of being interviewed) use of illegal drugs in 1999. *See* Substance Abuse and Mental Health Services Administration, *1999 National Household Survey on Drug Abuse: Chapter 2, National Estimates of Substance Abuse, available at*

people are especially susceptible to peer pressure encouraging the use of drugs and because of the especially virulent health damage caused by drug use among school-age children. *See Verno*515 U.S. at 661 ("School years are the time when the physical, psychological and addictive effects of drugs are most severe. 'Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound'; 'children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor.'" (citation omitted)).

Second, the Supreme Court in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), held that both search warrants and a requirement of probable cause are impractical in the school setting. *See* 469 U.S. at 340. Further, in *Vernonia* the Court went on to state that any suspicion-based testing changes the relationship between students and teachers from one of trust and cooperation to one of distrust and adversarial interactions. *See* 515 U.S. at 664 (noting that suspicionbased drug testing would "add[] to the ever-expanding diversionary duties of schoolteachers" by forcing them to "spot[] and bring[] to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation").

http://www.samhsa.gov/oas/NHSDA/1999/Chapter2.htm (last visited March 8, 2001).

More alarming still are the statistics regarding first time drug use among children between the ages of twelve and seventeen. Of the 2.39 million people who reported having tried marijuana for the first time in 1998, 1.56 million were between the ages of twelve and seventeen. Of the 934,000 people who first used cocaine in 1998, 315,000 were between the ages of twelve and seventeen. *See* Substance Abuse and Mental Health Services Administration, *1999 National Household Survey on Drug Abuse: Appendix G (Tables G.49, G.50), available at http://www.samhsa.gov/oas/NHSDA/1999/Appendixg.htm* (last visited March 8, 2001).

Third, in the closed environment of a public school, drug use by some students interferes with the rights of other students to learn and grow in the educational environment. *See id.* at 662 ("[O]f course the effects of a drug infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted."). Also, drug use may spread in such a setting, in a manner akin to other contagious diseases for which school districts have always had the authority to test and to control.

Fourth, and perhaps most important, is the Supreme Court's recognition in *Vernonia* that public schools vest in the State a responsibility to protect the children entrusted to its care from numerous social ills, including the use of illegal drugs. *See id.* ("[T]he necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction."). In this regard, a school district has an almost *in loco parentis* relationship with its students, which vests in the school district special responsibilities for, and concomitant authority over, those children. *See id.* at 654-55.

Accordingly, I agree with the majority that the public school district in this case need not demonstrate, as a threshold matter, a special need to adopt the challenged drug testing Policy before we may proceed to the required *Vernonia* balancing analysis.[3] *Accord Miller v. Wilkes,* 172

[3] As one commentator has noted:

> [T]he Court's student search decisions [in *T.L.O.* and *Vernonia* establish constitutional standards that are explicitly tailored to take account of the school context. More importantly, the Court justified the standards and results as necessary to protect the educational process. The Court in both *T.L.O.* and *[Vernonia* thus upheld the searches not on the ground that maintaining order is an inherently important goal, but rather on the theory that some semblance of order is a necessary means to achieve the "primary" goal of schools: educating students.

James E. Ryan, *The Supreme Court and Public Schools,* 86 Va. L. Rev. 1335, 1363 (2000). Accordingly, "the Court has tailored the constitutional standards . . . to fit the school context, and it has generally done so in a way that lends more authority to the government (here, school officials) and less protection to individuals (here, students) than exists outside the school context." *Id. at* 1369.

F.3d 574, 578 (8th Cir. 1999) ("The Supreme Court has held that the public school environment provides the requisite 'special needs' so that a school district may dispense with those Fourth Amendment protections [of probable cause and warrants issued by a neutral magistrate]."), vacated as *moot,* 172 F.3d at 582.

Notwithstanding the majority's statement that no special need for random, suspicionless drug testing must be demonstrated by the school district in this case, the majority appears to reimpose a special needs requirement toward the end of its opinion.

The majority writes:

> [A]ny district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to testing, such that testing that group of students will actually redress its drug problem. "[S]pecial needs must rest on demonstrated realities."

See ante at 33 (quoting *United Teachers of New Orleans v. Orleans Parish Sch Bd.,* 142 F.3d 853, 857 (5th Cir. 1998)). This is similar to language used by another panel of this court in a case arising in a non-school setting, *19 Solid Waste Department Mechanics v. City of Albuquerque.*

156 F.3d 1068 (10th Cir. 1998) (*"19 Solid Waste Mechanics"*), where we discussed the special needs analysis that must take place when reviewing random, suspicionless drug testing of certain city employees. There, this court stated that the special needs test asks whether the drug testing policy "was adopted in response to a documented drug abuse problem or whether drug use among the target group would pose a serious danger to the public." *Id.* at 1073. That threshold inquiry is inappropriate in a school setting, however, where the majority has correctly observed that a showing of special need is unnecessary pursuant to the Supreme Court's holding in Vernonia.

I believe that requiring the school district in this case to make a threshold showing of special need, based upon proven drug use by a "sufficient number of those subject to testing," before it may implement a policy of random drug testing of students engaged in extracurricular activities mandates a more detailed demonstration than was ever required in either *Vernonia* or *19 Solid Waste Mechanics*.

In *Vernonia*, the Supreme Court held that the respondent school district had justified its policy of randomly testing student athletes for drug use even though there was little actual evidence in the record that those students tested were, in fact, the students most likely to use drugs. Despite the district court's rhetoric to the contrary, *see, e.g., Vernonia*, 515 U.S. at 662-63 (noting the district court's findings that "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion" and "that the rebellion was being fueled by alcohol and drug abuse as well as by the studen[s'] misperceptions about the drug culture"), the evidence in *Vernonia* of drug use by student athletes, or even by other students attending either the school in question or other schools in the respondent school district,

was quite limited. The evidence of drug use among student athletes was confined to the smell of marijuana detected on one road trip by the school wrestling coach, *see id.* at 679 (O'Connor, J., dissenting), one "severe sternum injury suffered by a wrestler, and various omissions of safety procedures and misexecutions by football players, all attributable in [an expert witness's] belief to the effects of drug use," *id.* at 649. Thus, there was no real demonstration in the *Vernonia* record, other than the one-time smell of marijuana and one expert's opinion, that the student athletes subject to the drug testing policy were frequent drug users or had exhibited a propensity toward drug use. The evidence of drug use among the student body in general was similarly attenuated, as it consisted of only: (1) a few instances of observed drug use by students; (2) student absenteeism in one peer group due to its desire to use drugs during the school day; (3) admissions by "several students" that they had used drugs; (4) one student's "obviously inebriated" appearance one day at school; and (5) one student's statement that he was "high on life" while dancing and singing in the back of a classroom. *See id.* at 679 (O'Connor, J., dissenting). Finally, in regard to the three grade schools subject to the drug testing policy,[4] there was "virtually no evidence in

[4] The respondent school district in *Vernonia* operated four schools: one high school and three grade schools. *See Vernonia*, 515 U.S. at 648. The three grade schools apparently encompassed the first through eighth grades, while the high school apparently encompassed the ninth through twelfth grades. *See id.* at 684 (O'Connor, J., dissenting). All students enrolled at the high school who engaged in student athletics were subject to the challenged drug testing policy. *See id.* at 685 (O'Connor, J., dissenting). As to the grade schools, it appears that only the seventh and eighth grade student athletes were subjected to the drug testing requirement. *See id.* at 684 (O'Connor, J., dissenting) (noting that the *Vernonia* opinion upholds drug testing of seventh and eighth graders enrolled at the grade schools). The named plaintiff in *Vernonia*, James

the record" of student drug use. *See id.* at 684 (O'Connor, J., dissenting). At one grade school, for example, the only evidence of drug use among the student body was an unsupported "'guarantee' by the . . . grade school principal that 'our problems we've had in '88 and '89 didn't start at the high school level. They started at the elementary school.'" *Id.* (O'Connor, J., dissenting) (concluding, "Perhaps there is a drug problem at the grade school, but one would not know it from this record").

Thus, on facts not much more compelling than those presented in this case, the Supreme Court found that the school district in *Vernonia* had justified its drug testing policy for all students who were enrolled in the seventh through twelfth grades in any school within the district and who were engaged in sports-related, voluntary extracurricular activities.

Furthermore, in the non-school case of *19 Solid Waste Mechanics,* we held that the district had established an adequate interest in testing mechanics employed by the city for drug use, even though it had not demonstrated any nexus between the employees subject to the test and any known drug problem. *See* 156 F.3d at 1074 (accepting the city's asserted rationale for adopting a mandatory drug testing program, *i.e.,* "public safety and employee health," even though there was absolutely no demonstrated history of drug use by the group subject to testing). To the extent that we accepted a public safety rationale to justify the drug testing policy in *19 Solid Waste Mechanics, see id.* (noting that the tested employees worked around potentially dangerous machines and repaired city vehicles that would later be "released back onto city streets"), the

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Acton, was in the seventh grade when he initiated the lawsuit challenging the school district's drug testing requirement as it restricted his joining the Washington Grade School football team. See *id.* at 651.

asserted public safety concern in that case was certainly no more compelling or immediate than the safety and well-being of students enrolled in our public schools. And yet, despite the relative weakness of the city's "public safety and employee health" concerns, we held that an adequate justification for testing had been established in *19 Solid Waste Mechanics,* and we struck down the drug testing program only because the tested employees received advance notice of the tests, which were administered just once every four years, such that the drug testing "lack[ed] a real capacity to address drug use in the workplace." *Id.* Thus, it was the lack of efficacy in the solution, rather than the lack of a demonstrated drug problem or immediate public safety concern, that caused the drug testing policy to be invalidated in *19 Solid Waste Mechanics*.

Here, by reimposing a special needs requirement at the end of its opinion, and thereby requiring a school district to demonstrate an "identifiable drug abuse problem among a sufficient number of those subject to testing," the majority has both reneged on its earlier holding that a school district need not demonstrate a special need for random, suspicionless drug testing in the public school context and required more of the school district in this case than was ever required in either *Vernonia* or *19 Solid Waste Mechanics*.

For that reason, I must disagree with the majority's opinion on that issue.

2. *Balancing test*

I also disagree with the majority's ultimate application of *Vernonia*'s balancing test, by which the school district's Policy must be weighed. The *Vernonia* balancing test requires that we weigh the nature of the students' privacy interest and the character of the intrusion on that interest, on the one hand, against the nature and immediacy of the school district's concern and the efficacy of the proposed

solution, on the other hand. While I agree completely with the majority's discussion of several factors to be considered, and agree at least in part with its discussion of other factors, I nonetheless think the majority ultimately strikes the wrong balance.

a. *Nature of the Students' Privacy Interest and Character of the Intrusion*

The Supreme Court has stated that "students within the school environment have a lesser expectation of privacy than members of the population generally." *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring). I agree with the majority that the privacy rights of the students subject to testing under the Policy in this case are further diminished, as compared to the privacy rights of students in general, due to the students' voluntary participation in extracurricular activities. *See ante* at 28 ("We therefore conclude that, like athletes, participants in other extracurricular activities have a somewhat lesser privacy expectation than other students."). Further, I agree with the majority that the character of the intrusion at issue in this case is "virtually identical to the testing process in *Vernoni* about which the Supreme Court stated: "the invasion of privacy [is] not significant."

I diverge with the majority only where, once again, I believe it has not actually followed the articulated conclusions and analysis it has set forth for itself.

Despite having reached the conclusion that the students subject to testing under the Policy have reduced privacy expectations and that the intrusion itself is "not significant," the majority nevertheless places what appears to be substantial weight upon those factors when performing the final balancing test under *Vernonia*. That is, while the majority denigrates the school district's interests to be weighed on the other side of the scale, and perhaps rightly so, the majority appears to forget its earlier conclusion that there is just not much for the school

district's interests to be weighed against. In my opinion, having determined both that the students' privacy expectations are diminished and that the intrusion itself is minimal, the majority may find that the "balancing analysis [tips] decidedly in favor of the plaintiffs," *see ante* at 29, only if the factors favoring drug testing, which must be weighed on the other side of the scale under *Vernonia* are truly insignificant. That is clearly not the case.

b. *Nature and Immediacy of the School District's Concern, and Efficacy of the Drug Testing Policy*

As the Supreme Court stated in *Vernonia*, "That the nature of the concern is important—indeed, perhaps compelling—can hardly be doubted." *See* 515 U.S. at 661. It is difficult to imagine an interest more compelling than stemming the tide of illegal drug use by young women and men before they subject themselves, and our society, to substantial risk and heartache. The public schools have an obligation to supervise and control the students under their care. *See* id. at 655 ("[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.") (alteration in original). As noted by the *Vernonia* Court, this obligation imposes upon school officials a duty to protect the children under their care from evils that may befall them:

> While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional duty to protect, we have acknowledged that for many purposes school authorities ac[t] *in loco parentis*, with the power and duty to inculcate the habits and manners of civility.

Id. (citations and quotations omitted) (alternation in original). Discouraging drug use among impressionable children is without question an integral part of a public school's duty to "inculcate the habits and manners of civility" in the students entrusted to their care.

The immediacy of the school district's concern is, as noted by the majority, the weakest part of the school district's case. In *Vernonia,* the Court gauged the immediacy of the respondent school district's concern by discussing what it characterized as a serious drug problem evidenced in the district in question. *See* 515 U.S. at 662-63 (noting that, based upon the district court's factual findings regarding drug use in the school district, there was "an immediate crisis" justifying random, suspicionless drug testing of student athletes). The majority in this case seems to have interpreted the immediacy discussion in *Vernonia* to state that a drug problem is not "immediate" if it has not reached "crisis" levels, as is evidenced by the majority's statement that a school district must demonstrate "some identifiable drug abuse problem among a sufficient number" of students before it may implement a random drug testing policy. I disagree. While it may be true that under *Vernonia* there can be no drug testing of students where there is no evidence of drug use by the student body, *Vernonia* does not require that a school district allow illegal drugs to gain a stronghold among its schoolchildren before it may take steps to eliminate them through random drug testing. Indeed, as discussed earlier, *see* discussion *supra* at 8-9, in *Vernonia* itself the actual evidence of drug use by students in the respondent school district did not demonstrate that the school district had been overtaken by a drug problem of overwhelming proportions. Illegal drugs extract a tremendous toll on their victims, and are nearly impossible to eliminate once they have garnered a foothold

in our communities, schools and homes.[5] To the extent that it is possible to prevent the irreparable harm attendant to illegal drug use through the diligent efforts of officials in our public schools, we should allow them to try.

Finally, in regard to the efficacy of the program, we have received briefs from *amicus curiae* presenting arguments on both sides of this issue. It is clear from these briefs that the efficacy of random, suspicionless drug testing in the public schools may legitimately be debated by knowledgeable sources. What is even more clear from this robust scholarly and practical debate, however, is that the efficacy question is not one that ought to be decided by members of the federal judiciary, who are so far removed from public school students and the officials who supervise them as to make their determinations speculative in the extreme. I would therefore defer to the judgment of local school boards, which are far better positioned (and more accountable) than federal judges to decide the type of drug testing policy that will best serve their need to protect children entrusted to their care.

I find this to be a difficult case, and acknowledge that the balancing of the *Vernonia* factors is far from easy. Given the weight that I believe is properly afforded to each factor set forth in *Vernonia,* however, I would find that the Policy survives the constitutional balancing test and should therefore be upheld.

3. *Other Issues*

There are a few more things that must be said of my decision to dissent from the majority opinion.

First, I believe the majority places too little weight on the fact that the testing here is limited to extracurricular activities, where the students have voluntarily submitted themselves to

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[5] The intractability of drugs in our society is compellingly and realistically depicted in the film *Traffic* (USA Films 2000), a current Academy Award nominee for Best Motion Picture.

additional supervision and regulation. Participation in extracurricular activities is a privilege, not a right, *see Albach v. Odle,* 531 F.2d 983, 984-85 (10th Cir. 1976), and consequently schools are allowed to impose additional burdens on their participants, *see id. at* 985 (holding that the "supervision and regulation of high school athletic programs remain within the discretion of appropriate state boards"). *See also Todd v. Rush Count Schs.*, 133 F.3d 984, 986 (7th Cir. 1998). Additional conditions on student participation in extracurricular activities have often been upheld by this and other courts, and I see no reason why a drug test that we have deemed "not significant[ly]" invasive should be treated any differently. Furthermore, the extracurricular activities included within the purview of the challenged Policy involve travel and after-school activities where adult supervision is necessarily diminished as compared to the level of supervision involved in the average classroom. This reduced level of supervision in the context of extracurricular activities could well lead to the type of experimentation in drug use that this Policy is expressly designed to prevent.

The balancing might very well have come out differently if the drug testing Policy at issue in this case had been imposed upon the entire student body as a condition of enrollment in the respondent school district. *See* discussion *infra* at 20-21. In this case, however, the only students subject to testing are those who have chosen to engage in extracurricular activities which pose a potentially enhanced risk of drug abuse due to their decreased levels of supervision and which are privileges, not rights, to the affected students. In my view, this factor is insufficiently weighted by the majority in its opinion.

Second, the majority also errs, in my opinion, by arguing that the Policy is constitutionally suspect because it is both underinclusive and overinclusive. *See ante* at 30-31 (noting that the Policy "tests both too many students and too few" because it does not test all students who engage in travel or

potentially dangerous school-related activities, or all students involved in extracurricular activities that are difficult to supervise, but does test some extracurricular activity students who do not engage in travel or dangerous school-sponsored activities and who have no demonstrated history of, or propensity toward, drug abuse). It is true that not all students who travel as part of their extracurricular involvements are currently subjected to random drug testing under the Policy. Given the majority's concern about the Policy's constitutionality as it is currently formulated, however, it could hardly be considered "more" constitutional by the inclusion of more students into its testing scheme. In any event, we have never stated that a policy aimed at correcting a social ill need solve the entire problem in one fell swoop; in many cases it may be more prudent and efficacious to address social problems one step at a time, so that each step may be reviewed and adapted as necessary. *See Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 489 (1955) ("[T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.").

I believe the majority's concern about overinclusiveness is similarly misplaced under the Supreme Court's decision in *Vernonia.* As previously discussed, despite the expansive language in the lower court opinion in *Vernonia,* the actual evidence in that case did not show that all student athletes subjected to random drug testing had demonstrated a significantly higher propensity for drug use than any other children in the district or, for that matter, than the students subjected to random drug testing in this case. Indeed, *Vernonia* upheld a policy of drug testing that included selected grade school students involved in athletics, even though there was essentially no evidence that the tested grade school children used drugs at all. Any argument that the Policy is overinclusive is thus limited by the Supreme Court's recognition that the policy in *Vernonia* passed constitutional

muster despite its testing of students who had no demonstrated history of drug abuse.

Although I do not disagree that issues of overinclusiveness or underinclusivenes are relevant inquiries, the majority seems to require a nearly perfect match between the problem and the solution, akin to the narrowly tailored requirement utilized in strict scrutiny analysis. This is not required under *Vernonia*. *See Vernonia*, 515 U.S. at 661-65 (applying a less rigorous five-factor balancing test rather than a strict scrutiny analysis). Here, we are dealing not with a fundamental right but with the conditions a school district constitutionally may impose upon students who voluntarily engage in a privileged activity. As such, there is no requirement that the school district prove the Policy is narrowly tailored before it may withstand constitutional scrutiny. *Accord Vernonia*, 515 U.S. at 663 (rejecting plaintiffs' argument that the school district must adopt the "least intrusive" means possible, *i.e.*, suspicion-based testing, to detect student drug use).

This is not to say that all public school students can or should be randomly tested for drug use. While the Supreme Court in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 37 (1973), held that education is not a fundamental right, it recognized in *Goss v. Lopez*, 419 U.S. 565, 574 (1975), that a student's entitlement to an elementary and secondary public education is a property interest which is constitutionally protected by the Due Process Clause. I agree with Justice Ginsburg's statement in concurrence in *Vernonia* that she understood the Court's opinion "as reserving the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing . . . on all students required to attend school." *See* 515 U.S. at 666 (Ginsburg, J., concurring). *Vernonia* allows drug testing only of those students who voluntarily engage in extra-curricular activities, and thereby agree to be bound by additional rules and regulations to which the average,

non-involved student need not adhere. In my view, a random, suspicionless drug testing policy that tested all public school students as a requirement of their continued attendance in the public schools would present a potentially intolerable burden on those students' right to a free public education and would likely run afoul of the Constitution. But that is decidedly not the case with which we are presented today.

Third, this type of search is quite dissimilar to the general searches, typically related to criminal proceedings, about which the Framers were most concerned when they drafted the Fourth Amendment. The cases and authorities cited by Justice O'Connor in her *Vernonia* dissent to support the argument that the Framers "most strongly opposed . . . general searches—that is, searches by general warrant, by writ of assistance, by broad statute, or by any other similar authority," *see* 515 U.S. at 669 (O'Connor, J., dissenting), deal primarily with searches conducted in the criminal context, and not with searches conducted as a condition precedent to engaging in a voluntary, discretionary activity which carries no criminal consequences. Indeed, Justice O'Connor noted that "several evenhanded blanket searches, including some that are more than minimally intrusive," have been upheld by the Supreme Court where the searches took place not in the criminal context but in closely regulated industries or, more important to this analysis, "in unique contexts such as prisons." *See id.* at 673 (O'Connor, J., dissenting). It is undeniably true that state officials have considerably greater latitude in a prison setting than in a public school setting. It is nevertheless also true that public schools, somewhat like prisons and other highly regulated settings, present supervisory officials with unique circumstances and responsibilities that necessarily result in diminished Fourth Amendment rights for the people entrusted to their care. *See id. at* 656 ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness'

inquiry cannot disregard the schools' custodial and tutelary responsibility for children.").

Here, the information collected during the drug test is shared only with selected school officials on a need-to-know basis, and is never turned over to law enforcement officers or used to justify academic sanctions against students who test positive for illegal drug use. Further, if a student does not want to submit to a drug test, the school district cannot compel submission under the challenged Policy. Any student may refuse to submit to a drug test. The only consequence of that decision is the student's subsequent ineligibility to participate in a voluntary extracurricular activity because of his or her failure to satisfy one of the preconditions to participation in that activity.

Under these circumstances, where we are dealing with a population that has voluntarily subjected itself to testing and the test results are never used for criminal or disciplinary purposes, I do not believe the minimal privacy invasion involved presents the kind of general search that the Framers intended to prohibit when drafting the Fourth Amendment.

Fourth; I note, as does the majority, that the decision to strike down this Policy as unconstitutional creates a split among the federal circuit courts of appeals on an issue of substantial constitutional significance. In *Todd v. Rush County Schools*, 133 F.3d 984, 986-87 (7th Cir. 1998), the Seventh Circuit upheld against constitutional challenge a drug testing policy very similar to the policy at issue in this case. Rehearing en banc was denied in that case, despite the written dissents of four judges. *See Todd v. Rush County Schs.*, 139 F.3d 571 (7th Cir. 1998). It is true, as the majority states, *see ante* at 34 n.14, that the *Todd* decision was subsequently criticized by another panel of the Seventh Circuit. *See Joy v. Penn-Harris Madison Sch. Corp.*, 212 F.3d 1052 (7th Cir. 2000). However, the *Todd* decision nevertheless remains the law in the Seventh Circuit. The Eighth Circuit upheld a

similar drug testing policy in *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999), although that decision was later vacated as moot. The Fifth Circuit is likely to address this question soon, as a district court opinion invalidating a school district's random, suspicionless drug testing policy as it applied to students engaged in non-athletic extracurricular activities has apparently been appealed to that court. *See Gardner v. Tulia Indep. Sch. Dist.*, No. 2:97-CV-020-J, slip op. at 8 (N.D. Tex. Dec. 7, 2000) (stating that *Vernonia* "was limited to random drug testing of the student athletes").

For these reasons, I respectfully dissent and encourage the school district to seek an en banc rehearing by this court so that we may reconsider our decision. Failing that, perhaps the Supreme Court will grant a writ of certiorari to resolve the split among the circuits that we have today created on the important constitutional issue presented in this case.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed May 30, 2001]

No. 00-6128

JOHN DAVID EARLS, *et al.*,
Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF TECUMSEH PUBLIC SCHOOL DISTRICT, *et al.*,
Defendants-Appellees.

ORDER

Before BRORBY, ANDERSON and EBEL, Circuit Judges.

Appellees' petition for rehearing and suggestion for rehearing en banc is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35.

Judge Ebel voted to grant rehearing.

Entered for the Court
PATRICK FISHER, Clerk of Court

By: /s/ Illegible
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed July 3, 2001]

No. 00-6128

LINDSAY EARLS and LACEY EARLS, minors, by their next friends and parents, JOHN DAVID EARLS and LORI EARLS; DANIEL JAMES, a minor, by his friend and mother, LETA HAGAR,

Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF TECUMSEH PUBLIC SCHOOL DISTRICT, INDEPENDENT SCHOOL DISTRICT No. 92 of POTTAWATOMIE COUNTY; TECUMSEH PUBLIC SCHOOL DISTRICT, INDEPENDENT SCHOOL DISTRICT No. 92 of POTTAWATOMIE COUNTY,

Defendants - Appellees.

OKLAHOMA STATE SCHOOL BOARDS ASSOCIATION; NATIONAL SCHOOL BOARDS ASSOCIATION; WASHINGTON LEGAL FOUNDATION; U.S. SENATORS JUDD GREGG AND DON NICKLES; GOVERNOR FRANK KEATING; REP. FRED S. MORGAN (Oklahoma); OKLAHOMA SECONDARY SCHOOLS ACTIVITIES ASSOCIATION; ALLIED EDUCATIONAL FOUNDATION; GAYLA D. DUKE; RHONDA ELLARD; DEBRA FLETCHER; BOBBETTE HAMILTON; JIMMY AND SHEILA JORDAN; MICHAEL and KIM RAWLS; STEWART and ROSHEL STABEL; KENNETH A. STANLEY; KRIS STEELE; CLYDE L. and GAIL A. TOPPING; MIKE AND VALERIE TUCKER; STEVE and LYNNE YOUNG; THE AMERICAN PUBLIC HEALTH

ASSOCIATION; THE NATIONAL ASSOCIATION OF SOCIAL WORKERS; THE NATIONAL ASSOCIATION OF SOCIAL WORKERS-OKLAHOMA CHAPTER; THE CENTER FOR LAW AND EDUCATION; THE NATIONAL CENTER FOR YOUTH LAW; THE JUVENILE LAW CENTER; THE LOYOLA CHILDLAW CENTER; ADVOCATES FOR CHILDREN OF NEW YORK; LAWYERS FOR CHILDREN; COVENANT HOUSE NEW JERSEY; PROFESSOR MARTIN GUGGENHEIM & PROFESSOR RANDY HERTZ; AMERICAN ACADEMY OF PEDIATRICS,

Amici Curiae.

ORDER

Filed July 3, 2001

Before EBEL, ANDERSON and BRORBY, *Circuit Judges*.

This matter is before the panel on appellants' application pursuant to 42 U.S.C. § 1988(b) for appeal-related attorneys' fees, costs and expenses, together with appellants' separate application to tax costs on appeal pursuant to Fed. R. App. P. 39.

As to the application to tax costs pursuant to Fed. R. App. P. 39, appellees do not challenge the amount of $738.41 which appellants seek for photocopying expenses of appellants' briefs and appendix for the appeal. In light of this court's order of May 30, 200l, denying appellee's petition for rehearing with suggestion for rehearing en banc, we hereby grant appellants' application to tax costs on appeal in the amount of $738.41. *See* Fed. R. App. P. 39(c); *In re Penn Central Transp. Co.*, 630 F.2d 183, 191 (3d Cir. 1980).

With respect to the application for attorneys' fees, costs and expenses pursuant to 42 U.S.C. § 1988(b), appellees argue that any such award should reflect the fact that, in their view, appellants did not prevail on every issue. We disagree. By any rational evaluation of this case, appellants are prevailing parties. We hereby grant appellants' application for

appeal-related attorneys' fees, costs and expenses pursuant to 42 U.S.C. § 1988(b), and remand this matter to the district court for determination of the appropriate amount to be awarded.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

[Filed Mar 9, 2000]

Case No. CIV-99-1213-R

LINDSAY EARLS, a minor, by her next friends and parents, JOHN DAVID EARLS and LORI EARLS; and DANIEL JAMES, by his next friend and mother, LETA HAGAR,

Plaintiffs,

vs.

BOARD OF EDUCATION of TECUMSEH PUBLIC SCHOOL DISTRICT, INDEPENDENT SCHOOL DISTRICT No. 92 of POTTAWATOMIE COUNTY, OKLAHOMA; and TECUMSEH PUBLIC SCHOOL DISTRICT, INDEPENDENT SCHOOL DISTRICT No. 92 of POTTAWATOMIE COUNTY, OKLAHOMA;

Defendants.

ORDER

Before the Court are the parties' cross-motions for summary judgment. Both sides seek summary judgment on the Plaintiffs' claims for declaratory and injunctive relief.

I. *Summary of the Evidence.*

The Plaintiffs, Lindsay Earls and Daniel James, are students at Tecumseh High School. The Defendants, Board of Education of Tecumseh Public School District and Tecumseh Public Schools, operate the school and establish and implement its policies. For many years, Tecumseh High School has offered a range of student activities, including choir, marching band, color guard, Future Farmers of

America and Future Homemakers of America, which were generally open to all students who wished to participate. The school has also offered various team sports and other activities to a limited number of students on a competitive basis. The vast majority of students participate in one or more school-sponsored activities. Plaintiff Lindsay Earls is a member of the show choir, the marching band and the academic team. Plaintiff Daniel James "seeks to participate" in the academic team in the 1999/2000 school year, and is enrolled in the academic team class.[1]

On September 14, 1998, the school district adopted the Student Activities Drug Testing Policy ("the Policy"), which requires all students who participate in extracurricular activities to submit to suspicionless drug testing. (See Plaintiff's Exhibit "O"). By its terms, the Policy requires that "any student that represents Tecumseh Schools in any extracurricular activity such as FFA [Future Farmers of

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[1] The Defendants do not expressly contest either Plaintiffs standing to challenge the drug testing policy. However, the Court notes that the Defendants make allegations about Plaintiff Daniel James which call his standing into question. The Defendants' evidence indicates that Daniel James has been attending school in the District since March of 1998. He failed five academic subjects in the 1998/1999 school year, and failed the Academic Team class in the 1999/2000 school year, and was suspended from school in the 1998/1999 school year for a violation of District policy against carrying electronic pagers. Therefore, the Defendants contend, Daniel James is ineligible to participate in any interscholastic competition sanctioned by the OSSAA for this entire school year. The Plaintiffs argue that Daniel James' disciplinary suspension was unfair or unreasonable. There is some dispute as to whether the suspension was the cause of Mr. James' failing grades. The Plaintiffs contend that the suspension automatically caused Mr. James to fail his courses due to excessive absences, and the Defendants contend that the failures were unrelated to the suspension. The Court finds it unnecessary to resolve this dispute under the circumstances. Because there is no suggestion of lack of standing on the part of Plaintiff Lindsay Earls, the Court must reach the merits of the Plaintiffs' constitutional attack on the District's drug testing policy in any event.

America], FHA [Future Homemakers of America], Academic Team, Band, Vocal, Pom Pon, Cheerleader and Athletics," will be barred from participating in such activities unless the student submits a written consent to drug testing.[2] Students are required to undergo drug testing before participating, randomly during the year while participating, and at any time while participating in competitive activities upon reasonable suspicion. The test used by the District detects only amphetamines, cannabinoid metabolites (marijuana), cocaine, opiates, barbiturates and benzodiazepines.[3] A yearly fee of four dollars is charged for each student participating in the drug testing program.[4] It is conceded that the Policy has been applied, since its inception, only to those extra-curricular activities of a competitive nature.[5] The student Plaintiffs and

[2] See Plaintiffs' Exhibit "0." The original draft of the Policy covered only those students engaged in athletic competition. Prior to its adoption, however, the Policy was expanded to include "any extra-curricular activities."

[3] Upon reasonable suspicion, students may be tested for other substances identified in the Policy, including alcohol and anabolic steroids.

[4] The Defendants allege in their brief that the $4.00 fee is waived for students who cannot afford to pay it. In support of this assertion, the Defendants cite the deposition testimony of two teachers, Carolyn Daugherty and Danny Jacobs. Ms. Daugherty testified that she advised her students that if they had a problem with the fee, they should come to her and "they could work it out." (Deposition of Carolyn Daugherty, p. 70). Mr. Jacobs testified that he was sure that someone in the school administration or a faculty member or sponsor would cover the fee if necessary. (Deposition of Danny Jacobs, pp. 134-135). The Plaintiffs point out that the Defendants have not shown that the District has established an official policy of waiving the fee for underprivileged students. However, the Plaintiffs have not argued that the fee is unreasonable, or shown evidence that the fee has excluded any student from participating in extracurricular activities. Thus, the Court finds no constitutional deprivation arising out of the $4.00 annual fee.

[5] It is undisputed that the Policy has been applied only to those extracurricular activities which involve some aspect of competition, and

their parents challenge those provisions of the Policy which require suspicionless drug testing of students participating in non-athletic activities.[6]

II. *Reasonableness of the Policy.*

The state-compelled collection and testing of urine constitutes a "search" governed by Fourth Amendment principles of reasonableness. *Vernonia School District 47J v. Acton,* 515 U. S. 646 at 652-653, 115 S. Ct. 2386 at 2390, 132 L. Ed. 2d 564 (1995). Under the challenged Policy, the random acquisition and analysis of a urine sample is not supported by a warrant, probable cause, or individualized suspicion. As the Supreme Court has held, however, neither a warrant, nor probable cause, nor any measure of individualized suspicion is an indispensable component of reasonableness in every circumstance. *Vernonia, supra; National Treasury Employees Union v. Von Raab,* 489 U. S. 656, 665-668, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989). Officials are permitted to dispense with the warrant and probable cause requirements where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement. *Id.*

which are sanctioned by the Oklahoma Secondary Schools Activities Association ("OSSAA").

[6] The Plaintiffs do not challenge the Policy insofar as it applies to athletes, or insofar as it provides for drug testing upon reasonable, individualized suspicion. The Defendants point out that Plaintiff Daniel James is a member of Life Guides, a group sponsored by the Youth and Family Resource Center in Shawnee, Oklahoma, which has its own drug testing policy. The Court does not consider Mr. James' participation in Life Guides to have much bearing upon his objection to the School District's drug testing policy. First, Life Guides is not an official, school-sponsored organization, and second, the Life Guides drug testing program calls for suspicion-based testing. See Deposition of Daniel James, Defendants' Exhibit "J," pp. 141-142.

A. Existence of a Special Need.

The Supreme Court has historically found "special needs" to exist in the public school context, where the warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed," and "strict adherence to the requirement that searches be based upon probable cause" would undercut "the substantial need of teachers and administrators for freedom to maintain order in the schools." *Vernonia,* 515 U. S. at 653,115 S. Ct. at 2391, *citing New Jersey v. T. L. O.,* 469 U. S. 325,105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).[7] In *Vernonia,* the Supreme Court found that a public school district had sufficiently demonstrated a special need justifying a similar drug testing policy.[8]

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[7] The Supreme Court has also upheld suspicionless, warrantless searches and seizures to conduct drug testing of railroad personnel involved in train accidents, *see Skinner v. Railway Labor Executives' Association,* 489 U. S. 602, 109 S. Ct.1402,103 L. Ed. 2d 639 (1989); to conduct random drug testing of federal customs officers who carry arms or are involved in drug interdiction, *see National Treasury Employees Union v. Von Raab,* 489 U. S. 656,109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989); and to maintain automobile checkpoints looking for illegal immigrants and contraband, and drunk drivers, *see United States v. Martinez-Fuerte,* 428 U. S. 543, 560 - 561, 96 S. Ct. 3074, 3084, 49 L. Ed. 2d 1116 (1976); *and Michigan Department of State Police v. Sitz,* 496 U. S. 444,110 S. Ct. 2481,110 L. Ed. 2d 412 (1990). In each of these cases, the Supreme Court balanced the intrusion on individuals' privacy interests against the promotion of legitimate governmental interests. Under that balancing equation, on one side, the Court examined the nature of the privacy interest upon which the search at issue intrudes and the character of the intrusion. *See Vernonia, supra.* On the other side, the Court considered the nature and immediacy of the governmental concern at issue, and the efficacy of the challenged test for meeting it. *Id. See also 19 Solid Waste Department Mechanics v.* City of *Albuquerque,* 156 F. 3d 1068, 1072 (10'h Cir. 1998).

[8] As explained more fully below, the Vernonia School District's policy was limited to student athletes, whereas the Policy challenged here applies to all students participating in competitive extracurricular activities.

The Plaintiffs argue that the Defendants have not made a similar showing of a "special need" beyond the need for normal law enforcement.[9] As the Plaintiffs point out, in approving the drug testing policy at issue *in Vernonia,* the Supreme Court stressed both the severity and the immediacy of the drug problem in the school district. The Court agreed with the district court's conclusion that "a large segment of the student body" was "in a state of rebellion," that disciplinary actions "had reached epidemic proportions," and that these problems were being "fueled by alcohol and drug abuse as well as by the students' misperceptions about the drug culture." 515 U. S. at 662-663,115 S. *Ct. at* 2395.[10]

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[9] *See Vernonia, supra, quoting Grim v. Wisconsin,* 483 U. S. 868, 873,107 S. Ct. 3164, 3168, 97 L. Ed. 2d 87 (1987).

[10] The Supreme Court in *Vernonia* concurred with the trial court's finding that the school district's concerns were "immediate," citing evidence of rampant drug abuse and a "drug culture" within the student body. The evidence in that case indicated that a "large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion;" that disciplinary actions had reached "epidemic proportions," and that the "rebellion was being fueled by alcohol and drug abuse as well as the students' misperceptions about the drug culture." Teachers and administrators had observed a sharp increase in drug use. Students were beginning to speak out about their attraction to the drug culture, and to boast that there was nothing the school could do about it. Disciplinary referrals in the district had risen sharply, and several students had been suspended. School officials observed that students had become increasingly rude during class, and that outbursts of profanity had become common. 515 U. S. at 648-649,115 S. Ct. at 2388-2389. Not only were student athletes included among the drug users, but athletes were the leaders of the drug culture in that school. The Court cited evidence that drug use increases the risk of sports-related injury. One athletic coach had witnessed a severe sternum injury suffered by a wrestler, and various omissions of safety procedures and misexecutions by football players, all of which the coach attributed to the effects of drug use. The Court described the school administration as being "at its wits end," and noted that a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion. The Court termed the

Although the *Vernonia Court* emphasized the severity of the drug problem in that school, this Court does not view the majority's holding in *Vernonia* to be limited to those circumstances where the drug problem is of such magnitude. The Supreme Court has found special governmental needs to justify suspicionless drug testing in other contexts, without first finding a pervasive drug problem among the group to be tested. *See, e. g., Skinner v. Railway Labor Executives' Assn,* 489 U. S. 602, 109 S. Ct.1402,103 L. Ed. 2d 639 (1989) (Upholding regulation requiring suspicionless drug testing of railroad employees involved in train crashes); *Von Raab,* 489 U. S. 656,109 S. Ct. 656, 103 L. Ed. 2d 685 (Sustaining a Customs Service program requiring drug tests as a condition of promotion or transfer to positions directly involving drug interdiction or requiring the employee to carry a firearm).[11] In these cases, the Court's findings of special need were not based upon any evidence of pervasive drug abuse among the groups to be tested; instead, the Court's findings were based on the fact that drug abuse by members of the targeted group presents special concerns. As the Supreme Court explained in *Vernonia,* illegal drug use by adolescent schoolchildren also presents special concerns.

The Plaintiffs' interpretation would mean that random drug testing of students by public school districts is not reasonable where illegal drug abuse by minor children is known to exist within a particular school unless the problem is shown to have reached epidemic proportions. This interpretation is plainly at odds with the Supreme Court's recognition of the

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situation an "immediate crisis of greater proportions than existed in *Skinner,*" and "of much greater proportions than existed in *Von Raab.*" 515 U. S. 646 at 662-663,115 S. Ct. 2386, 2395.

[11] "*Cf. Chandler v. Miller,* 520 U. S. 305, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997) (Striking Georgia's requirement that candidates for state office pass a drug test because it was not supported by a showing of special need).

heavy responsibility imposed upon school officials for the education, guidance and well-being of the minor children placed in their care, and the Court's recognition of the devastating effects of drug abuse by school children.

Admittedly the evidence in this case does not show an epidemic of illegal drug abuse in the Tecumseh School District. There is some evidence of student drug abuse dating back to the 1970's, which has continued to exist in more recent years. The school board president and three teachers testified on deposition that they had heard students speaking openly about using drugs in recent years.[12] Two teachers also testified that they had seen students who appeared to be under the influence of drugs.[13] Even the two student Plaintiffs have

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[12] Dean Rogers, current president of the school board, testified that a girl had called her during the 1997-1998 school year, and told her that someone was passing a marijuana cigarette around in a classroom. (Defendants' Exhibit "C," p.145). Ms. Rogers testified that she once overheard a conversation in which a boy who was in the FFA invited some other boys to a party, telling the boys that he would have "plenty of smoke," which Ms. Rogers understood to mean marijuana. (Defendants' Exhibit "C," pp. 145-147). Ms. Rogers also testified that her granddaughter once told her that a boy was "bombed out," and that a teacher had asked the boy if he was all right. On one occasion a girl called Ms. Rogers to tell her that a marijuana cigarette was being passed around in a classroom. These incidents reportedly occurred during the 1997-1998 school term. Teacher Sheila Evans testified that she has been "amazed" to hear students in her classes speaking so freely about marijuana use. Ms. Evans testified that she has overheard students talking about the use of drugs in the last five years. Teacher Danny Sterling further testified that he had occasionally heard students openly talking about using drugs, and that these students showed no fear of being overheard by him. Defendants' Exhibit "I," pp. 78-79. Vocal music teacher and choir director Carolyn Daugherty testified that she has heard from students that other students were using drugs. (Deposition of Carolyn Daugherty, Plaintiffs' Exhibit "A," p. 45).

[13] Deposition of Carolyn Daugherty, Plaintiffs' Exhibit "A," pp. 45-47; deposition of Danny Sterling, Defendants' Exhibit "I," testimony of Danny Sterling, p. 78.

acknowledged that there is some drug abuse by Tecumseh High School students.[14] In recent years a drug dog has found marijuana cigarettes near the boundary of the school parking lot, and has alerted on a vehicle which contained "small particles and seeds of marijuana."[15] Police officers once found drugs or drug paraphernalia in a car driven by an FFA member."[16]

According to the School Board President, over the last two years, "people all over the community" were becoming more "aware" of the drug problem in the Tecumseh school."[17] In February 1998, a parent contacted the School Board President to discuss her concerns about drug use in the school. Later, this parent appeared at an open meeting of the School Board and openly discussed how drug use was affecting her son and his friends."[18] In the fall of 1998, "people were calling the [school] board members" to talk "about the drug situation."[19] Each of these situations arose

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[14] Shortly after filing this lawsuit, Plaintiff Lindsay Earls appeared on a national television news program and stated that there is a widespread drug problem in the District. Later, in her deposition, Plaintiff Earls testified that she now does not know whether the drug problem in the District is widespread. See Defendants' Exhibit "G," testimony of Lindsay Earls, pp. 20-25, 26, 29). Plaintiff Daniel James testified on deposition that he has personally, physically observed "about twelve" students of Tecumseh High School under the influence of illegal drugs. Defendants' Exhibit "J," p. 234. Plaintiff James made this statement in response to a question about parties he had attended at which students seemed to be under the influence of drugs. He did not indicate that these twelve students had actually used drugs at school, nor did he suggest that they appeared to be under the influence at any official school function.

[15] Plaintiffs' Exhibit "E," Deposition of James Blue, pp. 38-41, 43,136.

[16] Defendants' Exhibit "C," pp. 170 -171.

[17] Defendants' Exhibit "C," p. 71.

[18] Defendants' Exhibit "C," pp. 78-79.

[19] Defendants' Exhibit "C," p. 78.

after the District had taken numerous other measures to discourage drug abuse by its students.[20]

In determining whether the Defendants have demonstrated a "special need" sufficient to justify suspicionless drug testing, the Court does not focus solely upon the evidence of actual use or possession of illegal drugs by students. Consistent with the Supreme Court's analysis in *Vernonia,* the Court considers not only this evidence, but such other factors as the cultural or social atmosphere in which students spoke openly of illegal drug use, even in the presence of teachers; phone calls to school board members from parents; and the public plea of a concerned mother who implored the school board to "do something" about the problem of drug use among the high school's students."[21]

The Plaintiffs cite several cases for the proposition that drug testing programs may be upheld under the special needs doctrine only when applied to individuals whose activities affect safety. *See, e. g., Bolden v. Southeast Pennsylvania Transportation Authority*, 953 F. 2d 807, 823 (3rd Cir.1991), *cert. denied,* 504 U. S. 943, 112 S. Ct. 2281, 119 L. Ed. 2d 206 (1992); *Laverpool v. New York City* Transit Authority, 835 F. Supp.1440,1455 (E. D. N. Y.1993), *aff'd*, 41 F. 3d 1501(2nd Cir.1994); *Plane v. United States*, 750 F. Supp.

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[20] Prior to adopting the drug testing policy, the District had implemented several educational programs and security measures designed to deter drug use. The District actively observes "Red Ribbon week" each school year, during which anti-drug rallies are held and students are urged to pledge to remain drug-free. The school also uses "victim impact" speakers, and a program referred to as the "Grim Reaper" program. The school uses drug dogs to search school property, has been provided with a city police officer to patrol the high school, and has installed surveillance cameras. (Defendants' Exhibit "I," Defendant's Exhibit "J," pp. 54-57).

[21] The Court finds the fact that some sixteen parents have joined in an *amicus curiae* brief in favor of the drug testing policy to be some indication of parental support for the Policy.

1358, 1369 (W. D. Mich. 1990); *Burka v. New York City* Transit Authority, 739 F. Supp. 814, 822 (S. D. N. Y. 1990); and *Gonzalez v. Metropolitan Transportation Authority,* 174 F. 3d 1016 (9th Cir. 1999). Each of these cases involved adults challenging mandatory drug testing in the employment context. Together, these cases establish that certain jobs carry a diminished expectation of privacy because their duties carry a substantial threat to safety. As explained in *Gonzalez, supra,* children committed to the temporary custody of the state as schoolmaster also have a substantially diminished expectation of privacy as compared to adults, simply because of their protected status.[22]

The Plaintiffs attempt to refute the Defendants' evidence with statements made by school officials in the School District's annual applications for funding from the Safe and Drug Free Schools and Communities program over the years.[23] The statements, contained in each of several

[22] The Court further observes that of the Plaintiffs' cases cited above, all except Gonzalez were decided before the Supreme Court addressed the issue of drug testing in public schools in *Vernonia,* 515 U. S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995).

[23] The Plaintiffs cite isolated comments contained in an application the District submitted in prior years to the state Department of Education under the Drug Free Schools and Communities Act of 1986. In these applications, school officials wrote: "The use of tobacco and alcohol continue to be our number one problem. Our students utilize alcohol primarily on the weekends and use tobacco, especially smokeless tobacco, on a more regular basis. Other types of drugs, including controlled dangerous substances, are present but have not identified themselves as major problems at this time." (Plaintiffs' Exhibit "B," pp. 291, 303, 344). In context, it appears that the author meant that drugs were not believed to be a "major" problem as compared to alcohol and tobacco. Even the Plaintiffs' interpretation would not warrant a different result. Despite the rather optimistic assurance that drugs were not a "major" problem, the District has amply demonstrated that the possession and use of illegal drugs, and an atmosphere of apparent acceptance of drug use by students were sufficiently serious problems to warrant a finding of "special need."

applications, indicate that although controlled substances were "present" within the school, illegal drug use was "not a major problem at this time." These statements are inherently subjective and imprecise, and in no way refute the Defendants' evidence that there was a drug problem at the school at the time the Policy was adopted. In fact, although these statements optimistically portray the drug problem as "not major," they acknowledge that the problem did exist. Viewing the evidence as a whole, it cannot be reasonably disputed that the Defendant School District was faced with a "drug problem" when it adopted the Policy." [24]

While the evidence in this case does not show a drug problem of epidemic proportions, or a student body in a state of rebellion, it certainly shows legitimate cause for concern. This Court is well aware of the prevalence of illegal drugs in our society, including our schools. The undersigned has observed, far too frequently, the devastating effects of illegal drug use, not only upon the users, but upon the countless others whose lives are touched. The Supreme Court has observed that drug abuse among public school students causes discipline problems, inattentiveness, and an atmosphere of disruption in the classroom. In such an environment, the mission of the school is thwarted, to the detriment of both the drug-impaired pupils and the innocent. Illegal drugs are known to cause overall health problems for users, and to pose serious safety risks for others. As the Supreme Court emphasized in *Vernonia, supra*, the school years are the time when the physical, psychological and

[24] *See Todd v. Rush County Schools,* 133 F. 3d 984 (7th Cir.), *cert. denied,* 119 S. Ct. 68,142 L. Ed. 2d 53 (1998), in which the Seventh Circuit upheld a drug testing policy in a school district which presented some evidence of drug use by students, but clearly did not show that student drug abuse had reached epidemic proportions, or that the student body was in a state of rebellion. The evidence is more fully outlined in the district court opinion. *See Todd v. Rush County Schools,* 983 F. Supp. 799 (S. D. Ind. 1997).

addictive effects of drugs are most severe. Maturing nervous systems are even more critically impaired by intoxicants than mature ones are, and childhood losses in learning are lifelong and profound. Children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. The effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted. Citing these facts, the Supreme Court has recognized that the importance of deterring drug use by all this nation's schoolchildren "can hardly be doubted." *Vernonia,* 515 U. S. 646, 661, 115 S. Ct. 2386, 2395. It would seem rather anomalous to require school officials to await an epidemic before taking peremptory measures. Having considered all of these factors, the Court finds that the Defendants have demonstrated a "special need" sufficient to justify the random drug testing policy at issue here.

B. Nature of the Privacy Interest Involved.

As established in *Vernonia,* the first factor to be considered in determining the reasonableness of a search is the nature of the privacy interest on which it intrudes. 515 U. S. at 654, 115 S. Ct. at 2391. The *Vernonia* Court noted that the subjects of the school district's drug testing policy were minor children who had been committed to the temporary custody of the state as schoolmaster. In that capacity, the Supreme Court explained, the state may exercise a degree of supervision and control greater than it could exercise over free adults. *Id.*[25] The Court explained that because public school children are required to submit to physical examinations and be vaccinated, they have a lesser privacy

[25] Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." *Vernonia,* 515 U. S. 646 at 655, 115 S. Ct. 2386 at 2392.

expectation with regard to medical examinations and procedures than the general population.[26] Student athletes have even less of a legitimate privacy expectation, because an element of communal undress is inherent in athletic participation, and because athletes are subject to preseason physical exams and rules regulating their conduct. 515 U. S. at 657, 115 S. Ct. at 2391-2393.[27] Thus, in the context of public school students, particularly student athletes, the expectation of privacy is significantly reduced.

The Plaintiffs challenge the Policy at issue here on the ground that it is not limited to student athletes, as was the challenged policy in *Vernonia,* but includes all students participating in any extra-curricular activities of a competitive nature.[28] The Plaintiffs argue that, unlike athletes, their

[26] The Court pointed out: "For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases. According to the American Academy of Pediatrics, most public schools provide vision and hearing screening and dental and dermatological checks. . . . Others also mandate scoliosis screening at appropriate grade levels. . . . Particularly with regard to medical examinations and procedures, therefore, students within the public school environment have a lesser expectation of privacy than members of the population generally." *Vernonia,* 515 U. S. at 655, 115 S. Ct. at 2392, citations omitted.

[27] The Court stated: "School sports are not for the bashful. They require 'suiting up' before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford." 515 U. S. at 657, 115 S. C. at 2393.

[28] The Plaintiffs point out that the Tecumseh Policy, by its terms, is not limited to those extracurricular activities of a competitive nature. Rather, the written Policy states that it applies to "member[s] of any middle school or high school Tecumseh Public School District sponsored extra-curricular organization." The Policy further provides: "This includes any student that represents Tecumseh Schools in any extra-curricular activity

privacy expectations have not been lowered beyond those of ordinary students by virtue of their participation in extracurricular activities.

It is true that in *Vernonia,* the Supreme Court stressed that the school district's policy was directed narrowly to drug use by athletes, where the risk of immediate physical harm to the user and other players is particularly high,"[29] and further observed that the school district's drug problem was particularly acute among its athletes. However, this Court does not read *Vernonia* as limiting a public school district's authority to conduct drug searches to student athletes. The Supreme Court did say that "[l]egitimate privacy expectations are even less with regard to student athletes." 515 U. S. at 657, 115 S. Ct. at 2392. That is not to say, however, that among public school students it is only athletes whose legitimate expectation of privacy is so diminished that a search such as this one can withstand constitutional *scrutiny.*

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such as FFA, FHA, Academic Team,, Band, Vocal, Pom Pon, Cheerleader, and Athletics." (Exhibit "0" at p. 2).

[29] The Court stated, in *Vernonia*:

> "Apart from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes. Amphetamines produce an 'artificially induced heart rate increase, peripheral vasoconstriction, blood pressure increase, and masking of the normal fatigue response,' making them a 'very dangerous drug when used during exercise of any type.' . . . . Marijuana causes 'irregular blood pressure responses during changes in body position,' 'reduction in the oxygen-carrying capacity of the blood,' and 'inhibition of the normal sweating responses resulting in increased body temperature.' . . . . Cocaine produces 'vasoconstriction, elevated blood pressure,' and 'possible coronary artery spasms and myocardial infarction.' "

515 U. S. at 662, 115 S. Ct. at 2395.

See Miller v Wilkes, 172 F. 3d 574 (8th Cir.1999);[30] *Todd v. Rush County Schools,* 133 F.3d 984 (7th Cir.) (Approving a drug testing policy which included all students participating in "extracurricular activities," including athletic teams, the student council, foreign language clubs, Fellowship of Christian Athletes, Future Farmers of America officers and the library *club), cert. denied,* 119 S. Ct. 68, 142 L. Ed. 2d 53 (1998). The *Vernonia Court* observed that simply being a student in a public school is "central" to a lowered expectation of privacy.[31]

Granted, student athletes are more likely than other students to disrobe and shower in locker rooms notorious for their lack of privacy. Student athletes also undergo routine preseason physical exams which are presumably not required of students participating in non-athletic activities. Nevertheless, as with athletics, there are features of non-athletic, extracurricular school activities that will lower the privacy expectation of those who opt to participate to a point below that of fellow students. *Miller v. Wilkes, supra.*"[32] Although they may not be as rigorous as those relating to student athletic programs, extracurricular clubs and activities,

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[30] The Court notes that the panel opinion *in Miller v. Wilkes, supra,* was vacated by order dated June 15, 1999. In that order, the court found that appellant Miller was no longer a student in the appellee school district, and vacated both the district court's judgment and the judgment on appeal as moot. The court further denied the appellant's petition for rehearing en banc as moot.

[31] The Supreme Court in *Vernonia* cautioned against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts. 515 U. S. at 665. The Court explained: "The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care." Id. Hence, it was the drug testing policy's application to students attending public school, not its exclusive application to student athletes, which the Court found to be central to its analysis. *Id.* at 654.

[32] See footnote 32 supra.

particularly those of a competitive nature, will have their own rules and requirements for participating students that do not apply to the student body as a whole. For example, each of the competitive activities to which the Policy has been applied is subject to the rules of the Oklahoma Secondary Schools Athletic Association ("OSSAA").[33] As with team sports, a faculty sponsor will monitor the students for compliance with the various rules that the clubs and activities dictate. Thus, students who elect to be involved in school activities have a legitimate expectation of privacy that is diminished to a level below that of the already lowered expectation of non-participating students.[34] The Court rejects the Plaintiffs' argument that the Defendant's drug testing policy is unreasonable because it includes non-athletes.

C. Character of the Intrusion.

The Court next addresses the character of the intrusion imposed by the District's drug testing policy. This analysis is informed at the outset by Supreme Court precedent establishing that minor children in the public school setting have a substantially lower expectation of privacy than do

[33] OSSAA rules require, among other things, that participating students maintain minimum standards of scholastic eligibility, i.e., that they not have a failing grade in any class during the semester in which they are participating, and that they have not failed a certain number of classes in the preceding semester. The Plaintiffs maintain that the OSSAA eligibility rules are applied quite broadly, so that a number of student groups not covered by the Policy are nevertheless subject to OSSAA rules.

[34] The Defendants also point to evidence that on some occasions, students participating in non-athletic activities compromise their privacy in ways comparable to that of athletes. For example, students competing in nonathletic activities travel out of town and out of state more frequently than the general student population. On these occasions, students sometimes sleep together in a dormitory setting, or share motel rooms. They may also share communal restroom facilities. (Deposition of Lindsay Earls, Defendants' Exhibit "G," pp. 37-45).

ordinary citizens. *Vernonia*, 515 U. S. at 656, 115 S. Ct. at 2392-2393. The nature of the student Plaintiffs' constitutional rights is what is appropriate for children in school. The essence of a public school's authority over children "is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults," and the "reasonableness inquiry" cannot ignore this fact of life.

As the Supreme Court explained in *Vernonia*, although collecting samples of urine intrudes upon "an excretory function traditionally shielded by great privacy," the degree of intrusion depends upon the manner in which production of the urine sample is monitored. 515 U. S. at 658, 115 S. Ct. 2393, *citing Skinner*, 489 U. S. at 626, 109 S. Ct. at 1418, 103 L. Ed. 2d 639 (1989).

When drug testing is conducted at the Tecumseh schools, the students to be tested are called out of class in groups of two or three. The students are directed to a restroom, where a faculty member serves as a monitor.[35] The monitor waits

[35] The Policy provides, in part:

> "All aspects of the drug use testing program, including the taking of specimens, will be conducted so as to safeguard the personal and privacy rights of the student to the maximum degree possible. The test specimen shall be obtained in a manner designed to minimize intrusiveness of the procedure. In particular, the specimen must be collected in a restroomn or other private facility behind a closed stall. The principal/athletic director shall designate a coach or school employee of the same sex as the student to accompany the student to a restroom or other private facility behind a closed stall. The monitor shall not observe the student while the specimen is being produced, but the monitor shall be present outside the stall to listen for the normal sounds of urination in order to guard against tampered specimens and to insure an accurate chain of custody. The monitor shall verify the normal warmth and appearance of the specimen."

See also Deposition of Danny Jacobs, Plaintiffs' Exhibit "B," pp. 180-82; Deposition of Grant Gower, Plaintiffs' Exhibit "F," pp. 44-46; Deposition of James Blue, Plaintiffs' Exhibit "E," pp. 79, 88.

outside the closed restroom stall for the student to produce the sample.[36] The monitor pours the contents of the vial into two bottles. Together, the faculty monitor and the student seal the bottles. The student is given a form to sign, which is placed, along with the filled bottles, into a mailing pouch in the presence of the student. Random drug testing was conducted in this manner on approximately eight occasions during the 1998/1999 school year. Approximately twenty students were tested each time.[37] Although some students have expressed embarrassment over the drug testing procedure,[38] it is the same basic procedure described *in Vernonia* as "nearly identical to those typically encountered in public restrooms, which men, women, and especially schoolchildren use

[36] "Under the Tecumseh drug testing policy, both male and female students produce their samples in the privacy of a closed restroom stall. In *Vernonia,* male students produced their sample standing at a urinal.

[37] Deposition of Grant Gower, Plaintiffs' Exhibit "E," pp. 44-46.

[38] (Deposition of Carolyn Daugherty, Plaintiffs' Exhibit "A," p. 94). According to Ms. Daugherty, approximately ten percent of her students have complained about the drug testing procedure. Four students have dropped the choir class since the Policy was implemented, one of whom told Ms. Daugherty that she was dropping the class because of the drug testing policy. (*Id.* at p. 95). Grant Gower testified that some students gave sideways looks to each other, and giggled and snickered during the testing procedure. (Deposition of Grant Gower, Plaintiffs' Exhibit "E," pp. 46-47). Plaintiff Lindsay Earls testified: "It's just kind of embarrassing for someone to be standing outside your stall listening to you while you use the restroom. It was kind of embarrassing." (Deposition of Lindsay Earls, pp. 91-92). Plaintiff Earls testified that one faculty member, the sponsor of the cheerleading squad, joked to her that she felt she was engaging in potty training. (*Id.* at 92). Plaintiff James testified that he considers being asked to provide a urine sample in order to participate in competitive activities to be disrespectful and humiliating. Mr. James does not necessarily object to providing a urine sample for his job at K-Mart or for Life Guides, which is not a school sponsored activity. (Deposition of Daniel James, Defendants' Exhibit "J," pp. 141-142).

daily.[39] 39 515 U. S. at 658,115 S. Ct. at 2393. The Supreme Court has characterized the privacy interests compromised by the process of collecting such urine samples as "negligible." *Id.*

The other privacy-invasive aspect of urinalysis is, of course, the information it discloses concerning the state of the subject's health, and the materials the subject has ingested. *Vernonia*, 515 U. S. at 658, 115 S. Ct. at 2393. As in *Vernonia,* the tests in question are designed to reveal only the presence of certain standard drugs, not medical conditions, and do not vary according to the identity of the student. The Policy provides that test results will be kept in confidential files separate from the students' other educational records, will be released only to those school personnel who "have a need to know," and will not be turned over to law enforcement authorities. 115 S. Ct. at 2393-2394. (Policy, Plaintiffs' Exhibit "O," p. 5). Test results are not used for any internal disciplinary function. (*Id.*).[40]

[39] The Plaintiffs argue that providing a urine sample under the Policy is more intrusive than the ordinary process of using a public restroom. Under the Policy, students providing a urine sample must urinate into a cup while a faculty member waits outside the stall, listening for the "normal sounds" of urination. The student must then hand the cup to the faculty member, who checks it for warmth, color and clarity while the student watches. (Plaintiffs' Exhibit "O"). Obviously, one does not usually encounter these particular intrusions when using a public restroom. Nevertheless, the procedure is otherwise the same as that encountered in a typical public restroom. The procedure used in Tecumseh is identical to that described with approval by the Supreme Court in *Vernonia,* except that in Tecumseh, both male and female students are afforded the privacy of a closed stall. The Court finds that the procedure employed by the Defendants for collecting urine samples is not unduly intrusive.

[40] The Tecumseh Policy does provide for students who test positive for drugs to participate in counseling sessions, and for repeat offenders to be excluded from participation in extracurricular activities. Test results are

The Plaintiffs allege that students who refuse to consent to testing under the Policy may suffer disciplinary measures or academic consequences. Although the Policy expressly provides that no academic sanctions will be imposed for violations,[41] the Plaintiffs contend that school officials have failed to ensure that teachers know and follow the "no sanction" provision. The Plaintiffs offer no evidence of any students actually suffering such disciplinary or academic consequences from refusing to consent to drug testing. At most, the Plaintiffs' evidence suggests that there was, in the beginning, some degree of confusion among some students and some faculty members as to whether a refusal to consent would affect a student's standing or enrollment in a competition-related class.[42] Nevertheless, it is clear that the

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not, however, used to subject students to disciplinary detention, suspension or expulsion from school, or any other internal disciplinary function.

[41] The Policy provides:

> "The sanctions imposed for violations of this policy will be limitations solely upon limiting the opportunity of any student determined to be in violation of this policy to a student's privilege to participate in extracurricular activities. No suspensions from school or academic sanctions will be imposed for violations of this policy."

Plaintiffs' Exhibit "O," p. 1.

[42] Apparently, students who participate in an extracurricular activity usually enroll in a corresponding course for academic credit. For example, student members of the Future Farmers of America enroll in an agriculture course, and that members of the school choir enroll in a vocal music class. The Plaintiffs contend that the Policy has been applied in a manner which has led students to believe that refusal to consent to drug testing will affect their class enrollment and their grades in these classes. At the meeting in which the Policy was explained to faculty members, school board member Danny Jacobs advised the faculty that any student who refused to participate in the drug testing program would remain in the class, and that there would be no academic sanction. (Plaintiffs' Exhibit "B," pp. 316-317). High School Principal James Blue acknowledged in his deposition testimony that at least one faculty member incorrectly

District's official policy, and actual practice, has been to allow students refusing to consent to drug testing to remain in the corresponding class. These students are permitted, and required, to participate in classroom activities for graded classroom work, as are all students who are ineligible for interscholastic competition.[43]

The Plaintiffs have also offered evidence that some faculty members give extra credit to students who compete in certain activities.[44] However, there is no evidence that students who refuse to consent to drug testing are treated any differently with regard to extra credit than any other non-competitors, or

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assumed that students who sign up for the competition classes intend to compete. Plaintiffs' Exhibit "E," pp. 145-146. However, Mr. Blue explained that there are a number of reasons why a student enrolled in a competition-related class may not actually compete. For example, a student who has enrolled in a class may simply decide not to compete, or may not be selected for the team. (Plaintiffs' Exhibit "E"). Whereas enrollment in "competition" classes is generally available to students who sign up, membership on a team is not guaranteed based on class enrollment. As an example, Mr. Blue testified that there are currently 16 students enrolled in the academic team class, of whom only four will be chosen as starting members of the competition team. (Plaintiffs' Exhibit "E"). Presumably, a student enrolled in a competition-related class might also become unable to compete because of injury, illness, or other personal circumstances. These students, like those who refuse drug testing, are nevertheless permitted to remain in the class without being penalized.

[43] See Affidavit of Nancy Warwick, Defendants' Exhibit "J."

[44] Teacher Danny Sterling testified on deposition that students enrolled in his agriculture classes can earn extra credit, and thus improve their grades, by competing in livestock shows. (Deposition of Danny Sterling, Plaintiffs' Exhibit "H," pp. 13-14). Mr. Sterling further testified that teachers "strongly encourage" all agriculture students to be members of the FFA, and to compete in the FFA shows so that they can apply what they have learned in the agriculture class. Deposition of Danny Sterling, pp. 28-30.

that any students' grades have been lowered because of their refusal to consent to drug testing.[45]

The Plaintiffs maintain that the Policy provides no protection against a student's positive drug test results becoming known to the school's general population, and allege that one student's positive test is already "widely known among students." The Plaintiffs surmise that a student could, hypothetically, reveal his own test results, or that his test results could become public knowledge by virtue of his sudden withdrawal from competitive activities shortly after being tested. The Court concludes that neither the unspecified allegation that one student's test results have become "widely known," nor speculation that future test results could become known, demonstrates an undue privacy invasion.[46] The Policy expressly provides for confidentiality of test results, and the Court must assume that the confidentiality provisions will be honored.

The Plaintiffs complain that the term "need to know" is not defined in the Policy, and that the District has, in practice, decided that athletic coaches and activity sponsors have a "need to know" that one of their students has tested positive.

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[45] Mr. Sterling testified that participating in livestock competitions "can just only help the grade, not hurt it." Sterling deposition, pp. 13-14.

[46] Obviously, a student who reveals his own test results thereby waives any privacy interest he may claim in that regard, and is hardly in a position to complain of the lack of confidentiality. *See, e. g, Doe v. City of New York,* 15 F. 3d 264 (2nd Cir. 1994); *Fraternal Order of Police Lodge No. 5 v. City* of *Philadelphia,* 812 F. 2d 105,111(3rd Cir.1987) (right to privacy can be waived). A student who divulges his test results to his classmates has no reasonable expectation of keeping those test results private. Furthermore, although it seems obvious that no confidentiality provision could prevent high school students from gossiping or from guessing, correctly or incorrectly, that a classmate who withdraws from extracurricular activities has failed a drug test, the Tecumseh policy includes confidentiality provisions similar to those approved by the Supreme Court in *Vernonia.*

Vernonia specifically approved of the procedure of disclosing test results to a limited class of school personnel who have a need to know. The Court finds the term to be self-explanatory, and finds no fault with the School District's decision to treat the coaches and sponsors of the activities affected as having a need to know. It is inherently reasonable to advise an athletic coach or activity sponsor of the reason why a student under his or her tutelage has been declared ineligible to practice or compete.

Next, the Plaintiffs argue that the District's procedure for collecting prescription drug information is unreasonably intrusive. The Plaintiffs complain that when consent forms were being collected, the choir teacher "looked at students' list[s] of prescription drugs and left the lists where other students could see them." (Plaintiffs' Brief in Opposition to Defendants' Summary Judgment Motion). The Plaintiffs further allege that during the testing process, students were again required to list all of their prescription drugs on a form reviewed by at least one teacher or coach, as well as the principal or athletic director.

The deposition testimony cited by the Plaintiffs in support of this proposition indicates that the teacher or coach to whom the form was submitted reviewed each consent form to make sure they included a parent's signature, the student's signature, and the requested medical information.[47] The Supreme *Court in Vernonia* found that a similar provision, requiring students to identify in advance prescription medication they were taking, "raise[d] some cause for concern." 515 U. S. 646, 659, 115 S. Ct. 2386, 2394. "On the other hand," the Court reasoned, "we have never indicated that requiring advance disclosure of medications is per se unreasonable." *Id.* The Court reasoned:

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[47] Testimony of Carolyn Daugherty, Plaintiffs' Exhibit "A," p. 84.

> "It may well be that, if and when [a student] was selected for random testing at a time that he was taking medication, the School District would have permitted him to provide the requested information in a confidential manner—for example, in a sealed envelope delivered to the testing lab. Nothing in the Policy contradicts that, and when respondents choose, in effect, to challenge the Policy on its face, we will not assume the worst. Accordingly, we [conclude] that the invasion of privacy was not significant."

515 U. S. at 660, 115 S. Ct. at 2394.

The Tecumseh Policy contains an express provision for confidentiality of prescription drug information. The Tecumseh Policy provides:

> "The monitor shall give each student a form on which the student may list any medications legally prescribed for the student, he or she has taken in the preceding thirty (30) days. The parent or legal guardian shall be able to confirm the medication list submitted by their child during the twenty-four (24) hours following any drug test. The medication list shall be submitted to the lab in a sealed and confidential envelope and shall not be viewed by district employees."

Plaintiffs' Exhibit "O," p. 5. Thus, to the extent that the Tecumseh Policy provides for disclosure of prescription drug information at the time of testing, it expressly provides for the level of confidentiality of prescription drug information contemplated by the Supreme Court in *Vernonia*.

The Plaintiffs offer evidence that, in practice, the District has not always adhered to the strict confidentiality provisions of the Policy. For example, the choir teacher testified on deposition that some students submitted lists of prescription drugs along with their consent forms, prior to the start of

testing.[48] The choir teacher admitted that she read some of the lists, and that she placed them in a folder or envelope which she may have occasionally left, closed but unsealed, on a table in the choir room.[49] Admittedly this practice represents a departure from the strict confidentiality provisions of the Policy. However, the Plaintiffs have not shown that the choir teacher's actions resulted in any actual disclosure of private medical information to fellow students.[50] The Court also finds it significant that the choir teacher testified that because she travels with her students off school premises, her students have been supplying her with prescription drug and other medical information long before the Policy was implemented.[51]

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[48] Deposition of Carolyn Daugherty, Plaintiffs' Exhibit "A," p. 81. Ms. Daugherty testified that students were only required to turn in the first page of the consent form, and were not required to turn in the second page, consisting of a prescription drug list.

[49] Deposition of Carolyn Daugherty, Plaintiffs' Exhibit "A," p. 82. Ms. Daugherty explained that she normally kept the folder or envelope in her office and closed the door, and that she tried to be very careful to safeguard it because it also contained money.

[50] The Plaintiffs have not shown that either the choir teacher or anyone else read their prescription drug lists, or even that they submitted such lists. Nor have the Plaintiffs shown that any students whose lists the choir teacher reviewed objected to this, or that the folder containing the forms was ever disturbed.

[51] Ms. Daugherty testified that she has generated her own form for obtaining medical information she considers pertinent from her students. Ms. Daugherty's form requires students to divulge any prescription drugs they are using, their insurance information and the name of an emergency contact person. Ms. Daugherty has been collecting this information from her students throughout her 29 years of teaching for reasons unrelated to the drug testing policy. She carries these forms with her when traveling with students on overnight trips, and has had occasion to use the information in a hospital emergency room. (Defendants' Exhibit "H," pp. 90-94).

The Plaintiffs also offer evidence that during the testing process, students handed their "forms" to the faculty monitor when they entered the restroom stall. However, it is not clear from the deposition testimony cited whether the "forms" referred to included prescription drug information or other information of a private nature. Nor does the evidence cited indicate whether the faculty monitors read the information contained on the forms, or whether students were allowed to place their forms in a sealed envelope. In the absence of any evidence of an actual breach of privacy, the Court will not assume the worst. Under the circumstances, the Court finds that the invasion of privacy was not significant. *Accord, Vernonia*, 515 U. S. at 660,115 S. Ct. at 23 94, *citing Skinner, supra*.

D. Effectiveness of the Policy.

The next factor to consider in weighing the reasonableness of the Policy is its effectiveness to address the special governmental need in question. *See, e.g., 19 Solid Waste Mechanics v. City of Albuquerque*, 156 F. 3 d 1068, 1074 (10th Cir. 1998). Addressing the efficacy of drug testing as a response to the severe drug problem in *Vernonia,* the Court noted that: "it seems . . . self-evident that a drug problem largely fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs." The Defendants offer evidence that, like student athletes, the student members of the other competitive groups are held in high esteem by their peers, and tend to be regarded as leaders and role models. The Plaintiffs deny that they are student leaders or role models, and further assert that students participating in extracurricular activities are among the least likely to use drugs.

The Court need not resolve the dispute over whether members of the targeted group, i.e., students participating in competitive extracurricular activities, are regarded as role

models. Nor will the Court speculate as to whether these students are more likely than others to abuse illegal drugs. The Supreme Court's holding in *Vernonia* does not require a school district to isolate those students most likely to use drugs.[52] Although the Supreme Court cited evidence that the drug problem in that school was particularly acute among athletes, the Court did not suggest that a school drug testing policy should target those most likely to use drugs, or exclude those deemed least likely to use drugs.[53] It can scarcely be disputed that the drug problem among the student body is effectively addressed by making sure that the large number of students participating in competitive, extracurricular activities do not use drugs.

The Court rejects the Plaintiffs' contention that only suspicion-based drug testing would be reasonable within the meaning of the Fourth Amendment. The Supreme Court has repeatedly refused to declare that only the least intrusive search practicable can be reasonable under the Fourth Amendment. *Vernonia*, 515 U. S. at 663, 115 S. Ct. at 2396; *Skinner*, 489 U. S. at 629, n. 9, 109 S. Ct. at 1420, n. 9. As the Supreme Court explained in *Vernonia,* the alternative of testing all students only upon suspicion is fraught with difficulties. "It may be impracticable, for one thing, simply because the parents who are willing to accept random drug testing [for students engaged in extracurricular activities] are

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[52] Similarly, the drug testing regulation upheld in *Skinner* made no attempt to isolate those railroad employees most likely to use illegal drugs. Nor did the drug testing policy in Von Raab isolate those customs employees deemed most likely to use illegal drugs.

[53] In this Court's view, any attempt to do either would raise serious concerns. A policy attempting to draw such distinctions would be subject to challenge as arbitrary, and would unfairly brand some students as "drug-prone." Drug testing under a policy target at the drug prone would undoubtedly carry a social stigma and inherent indignity unknown to students tested under a policy of random testing of those participating in certain extracurricular activities.

not willing to accept accusatory drug testing for all students, which transforms the process into a badge of shame." 515 U. S. at 663, 115 S. Ct. at 2396. Suspicion-based drug testing brings the risk that teachers would impose testing arbitrarily upon troublesome but not drug-likely students. It generates the risk of defending lawsuits charging arbitrary imposition of drug testing, or that demand greater process before accusatory drug testing is imposed. It would also impose upon school teachers and coaches the new function of spotting drug users, which is not readily compatible with their vocation. *Id.*

III. *Conclusion.*

Upon careful consideration of the evidence presented by both sides, the Court concludes that the Defendants have adequately demonstrated a special need to justify the warrantless, suspicionless drug testing at issue here. The Court finds that the privacy interest asserted is diminished by virtue of the Plaintiffs' position as children in a public school testing, and that the intrusion is minimal. The Court further finds that the policy is effective to address the special governmental need asserted. Accordingly, the Court concludes that the drug testing policy constitutes a reasonable search, permissible under the Fourth Amendment.

The Defendants' Motion for Summary Judgment is hereby GRANTED. The Plaintiffs' Motion for Summary Judgment is hereby DENIED.

IT IS SO ORDERED this 9th day of March, 2000.

/s/ David L. Russell
DAVID L. RUSSELL
Chief United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

[Filed Mar. 9, 2000]

Case No. CIV-99-1213-R

LINSDAY EARLS, a minor, by her neat friends and parents, JOHN DAVID EARLS and LORI EARLS; and DANIEL JAMES, by his next friend and mother, LETA HAGAR,

Plaintiffs,

vs.

BOARD OF EDUCATION OF TECUMSEH PUBLIC SCHOOL DISTRICT, Independent School District No. 92 of Pottawatomie County, Oklahoma; and TECUMSEH PUBLIC SCHOOL DISTRICT, Independent School District No. 92 of Pottawatomie County, Oklahoma;

Defendants.

JUDGMENT

Judgment is hereby entered in favor of the Defendants, Board of Education of Tecumseh Public School District, Independent School District No. 92 of Pottawatomie County, Oklahoma, Tecumseh Public School District, Independent School District No. 92 of Pottawatomie County, Oklahoma, and against the Plaintiffs, Lindsay Earls, a minor, by her next friends and parents, John David Earls and Lori Earls; and Daniel James, by his next friend and mother, Leta Hagar.

IT IS SO ORDERED this 9th day of March, 2000.

/s/ David L. Russell
DAVID L. RUSSELL
Chief United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

[Filed Mar. 24, 2000]

CIV-99-1213-R

LINDSAY EARLS, a minor, by her next friends and parents, John David and Lori Earls, and DANIEL JAMES, a minor, by his next friend and mother, Leta Hagar, and LACEY EARLS, a minor, by her next friend and parents, John David and Lori Earls,

Plaintiffs,

v.

BOARD OF EDUCATION OF TECUMSEH PUBLIC SCHOOL DISTRICT, Independent School District No. 92 of Pottawatomie County, and TECUMSEH PUBLIC SCHOOL DISTRICT, Independent School District No. 92 of Pottawatomie County,

Defendants.

AMENDED JUDGMENT

Judgment is hereby entered in favor of Defendants, Board of Education of Tecumseh Public School District, Independent School District No. 92 of Pottawatomie County, Oklahoma, Tecumseh Public School District, Independent School District No. 92 of Pottawatomie County, Oklahoma, and against the Plaintiffs, Lindsay Earls, a minor, by her next friends and parents, John David and Lori Earls; Daniel James, a minor, by his next friend and mother, Leta Hagar; and Lacey Earls, a minor, by her next friends and parents, John David and Lori Earls.

IT IS SO ORDERED this 24th day of March, 2000.

/s/ David L. Russell
DAVID L. RUSSELL
CHIEF UNITED STATES DISTRICT JUDGE

(2)

No. 01-332

Supreme Court, U.S.
FILED
SEP 24 2001
OFFICE OF THE CLERK

In The

Supreme Court of the United States

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY and INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY,

Petitioners,

v.

LINDSEY EARLS and LACEY EARLS, minors, by their next friends and parents, John David and Lori Earls, and DANIEL JAMES, a minor, by his next friend and mother, Leta Hagar,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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QUESTION PRESENTED

The question presented is whether the Tenth Circuit correctly decided that the Fourth Amendment protects students who engage in non-athletic extracurricular activities from a random, suspicionless drug testing policy imposed by the board of education in a high school with a longstanding history of minimal drug usage among its student body generally and where teachers, school administrators, and the board president agree that no documented drug problems exist among the targeted group and where the activities do not pose safety concerns for either the students involved or the public generally.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

Argument 7

Reasons for Denying the Writ 7

I. The Tenth Circuit Correctly Applied The Legal Principles That Have Been Clearly Established By This Court's Legal Precedents In Finding That This Drug Testing Policy, Based On No Evidence That The Targeted Group Engaged In Drug Use Or Posed A Safety Threat, Was An Unreasonable Search Under The Fourth Amendment 8

II. Petitioners Overstate The Conflict Existing Among The Circuits 20

Conclusion 23

TABLE OF AUTHORITIES

Page

CASES

Chandler v. Miller, 520 U.S. 305 (1997) 8, 10, 11, 16, 18, 19

City of Indianapolis v. Edmond, 531 U.S. 32 (2000) 8

Ferguson v. City of Charleston, 121 S.Ct. 1281 (2001) ..8, 13

Gardner v. Tulia Indep. Sch. Dist., 2000 U.S. Dist. LEXIS 20253 (N.D. Tex. 2000) 22

Joy v. Penn-Harris-Madison Sch. Corp., 212 F.3d 1052 (7th Cir. 2000) 21, 22

Miller v. Wilkes, 172 F.3d 574 (8th Cir. 1999), *vacating as moot*, 1999 U.S. App. LEXIS 13289 (8th Cir.) 7, 20

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) 10, 14, 15, 16

New Jersey v. T.L.O., 469 U.S. 325 (1984) 5, 19

Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989) 10, 14, 15, 16

Tannahill v. Lockney Indep. Sch. Dist., 133 F. Supp. 2d 919 (N.D. Tex. 2001) 22

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) 8, 19

Todd v. Rush County Sch., 133 F.3d 984 (7th Cir. 1998), *cert. denied*, 525 U.S. 824 (1998)... 7, 20, 21, 22

Trinidad Sch. Dist. No. 1 v. Lopez, 963 P.2d 1095 (Colo. 1998) 22

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) ..... *passim*

Willis v. Anderson Cmty. Sch. Corp., 158 F.3d 415 (7th Cir. 1998), *cert. denied*, 526 U.S. 1019 (1999) 21, 22

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTION

Amend. IV ..... *passim*

STATEMENT OF THE CASE

Despite a minimal amount of drug use in the district, and virtually non-existent drug use among students involved in non-athletic extracurricular activities, the Board of Education of Tecumseh Public School District chose to adopt the Student Activities Drug Testing Policy. (Petitioner's Appendix [hereinafter "Pet.App."] 14a, 19a). Under the policy, students participating in competitive extracurricular activities must submit to mandatory, suspicionless urinanalysis tests and must also submit a list of medical prescriptions they are taking. (Pet.App. 4a). Although Tecumseh's wide range of activities had previously been open to any students who wished to participate, students in the Academic Team, Band, Choir, Color Guard, Future Farmers of America ("FFA"), and Future Homemakers of America ("FHA"), as well as all athletes, were barred from those activities under the terms of the policy unless they submitted to suspicionless drug testing. (Pet.App. 5a).

Tecumseh High School did not adopt this drug testing policy as a means of addressing a demonstrated drug problem among its student body. Year after year, Tecumseh High School has documented remarkably low levels of illicit drug use among its students in its annual reports to the federal government. (Pet.App. 17a). Only alcohol and tobacco have been identified as significant problems among the student body, and the testing method under the policy does not screen for either substance. (Pet.App. 4a, 17a).

The decision to test students in non-athletic extracurricular activities in addition to athletes was not based on

a concern that these students were in need of special assistance or face the special safety risks that athletes confront. Indeed, the contrary is true. Just as national statistics on drug use among extracurricular students indicate, teachers, administrators, and the school board president of Tecumseh schools all agree that the students participating in non-athletic extracurricular activities are even less likely to use drugs than the student body as a whole. The results of the testing program underscore the virtual non-existence of drug use among non-athlete extracurricular students. Of the 505 students tested under the policy, only three in the high school tested positive – and all of these students were athletes.

Nor do these students face any special risk of physical injury. Unlike athletics, activities such as Choir, Band, Color Guard, Academic Team, FFA and FHA do not involve dangerous acts. Indeed, the risk of injury from participation in these extracurricular activities is even less than the risk associated with some assignments in ordinary curricular classes, such as working with equipment during shop class. (Pet.App. 22a-23a).

Furthermore, unlike athletes, students participating in non-athletic extracurricular activities do not submit to invasive physical exams and do not share rooms for communal undress and showering. (Pet.App. 19a-21a). Indeed, the only characteristic that distinguishes non-athlete extracurricular students from the general student body is that these students must maintain passing grades in order to compete in particular activities, a requirement that hardly differs from the requirements set upon all students in Tecumseh. (Pet.App. 65a-66a, 66a n.33).

The School District's only justification for targeting these students who are the last to be suspected of drug use is that any group in which a large number of students may be found, no matter how unlikely it is that they will use drugs, can be subjected to drug testing as a deterrent measure for the student body as a whole. (Petition 5-6). Although the School District alleges that the issue of drug use among students became suddenly pressing in the year leading up to the adoption of the policy (Petition 4), only two drug-related incidents occurred. One incident involved a student who did not engage in an extracurricular activity and no student was ever associated with the second incident. The only other evidence of alleged drug use at the High School were a few vague anecdotes, several of which allegedly occurred in the 1970s, told by the school board president and three teachers, based often on multiple levels of hearsay or mere speculations about possible drug use among unidentified students. (Pet.App. 17a-18a). Except for two instances spanning over thirty years, none of the evidence remotely implicates non-athletes participating in extracurricular activities with drugs. Lacking any tangible evidence of an alleged drug problem, the District tries to justify the need for the testing policy by the statements of a parent at a school board meeting in February of 1998. However, the parent was only addressing her athlete son's drug problem and her statements are only relevant to drug use among athletes.

Despite the paucity of evidence of drug use, the School District has imposed a policy that significantly impacts a child's experience in school. Students who

refuse to submit to drug testing are denied the opportunity to earn graded class credits, which may be used to raise grades. (Pet.App. 71a-72a). Even absent the academic consequences of the drug testing policy, extracurricular activities have become an integral part of the educational experience of students today. (Pet.App. 21a).

Respondents challenged this policy as applied to all interscholastic competitive activities, except athletics. Respondent Lindsey Earls participates in the school's Academic Team, Choir, Show Choir, and Marching Band. She was selected for random drug testing in early 1999 during which she filled a cup with a urine sample in a bathroom stall while a faculty member waited immediately outside the stall listening for the sound of her urination. Respondent Earls found the experience embarrassing and objects to having faculty members actively listening for the sound of her urination and to the physical procedure of having to put her urine in a cup. She also finds the entire Drug Testing Policy to be offensive and objectionable.

Respondent Daniel James desired to participate in the school's Academic Team during the 1999-2000 school year and was enrolled in the Academic Team class. Respondent James objects to suspicionless drug testing because he believes it interferes with his rights and his privacy. He further believes that giving a urine sample is humiliating and is disrespectful of him as an individual.

The district court relied upon *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995),[1] in which this Court upheld a drug testing policy of athletes that it concluded was narrowly targeted at athletes who acted as the ring leaders of the drug culture in a drug-infested school, faced risk of serious injury during their athletic activities, and had lowered privacy expectations because of physical exams and a practice of communal undress. Despite finding that drug use at Tecumseh schools was not a major problem (Pet.App. 57a), and despite noting many of the significant differences between the student athletes involved in *Vernonia* and the students in this case (Pet.App. 65a, 76a-77a), the district court relied heavily on its concern about the prevalence of drugs in society as a whole and the mere status of the tested individuals as students in finding the drug test at Tecumseh's schools constitutional. (Pet.App. 61a-62a, 77a).

Applying a careful analysis of the legal principles announced by this Court in *Vernonia*, the Tenth Circuit reversed, holding the search to be unreasonable. The Tenth Circuit found that the school context established a special need, consistent with this Court's recognition in *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1984), to dispense with the warrant and probable cause requirements of the

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[1] *Vernonia* established four criteria under which student drug testing policy would be evaluated: 1) the nature of the privacy interest upon which the search intrudes; 2) the nature and character of the intrusion; 3) the nature and immediacy of the governmental interest at issue; and 4) the efficacy of the drug testing scheme as a means for addressing the drug problem.

Fourth Amendment but retaining the need for individualized and reasonable suspicion before justifying a search. (Pet.App. 9a). After a comprehensive review of the evidence, the Tenth Circuit found drug usage among the targeted students was "negligible" and that drug testing students who are the least likely to use drugs and who do not engage in dangerous activities was unconstitutional.

In establishing the nature of the governmental concerns giving rise to the test, the Tenth Circuit fully recognized the importance of deterring drug use among students in America's schools.[2] (Pet.App. 22a). However, the Tenth Circuit also noted this Court's consistent emphasis of the particular safety hazards faced by the student athletes subject to the *Vernonia* testing scheme. (*Id.*) Finding such hazards absent here, the court did not consider safety a factor sufficient to justify subjecting these students to this drug testing scheme.[3] (Pet.App. 23a). The court further held that where, as here, a comprehensive review of the evidence clearly indicates that drug use among the targeted group is negligible, the

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[2] Here, the school board did not implement this policy with the goal of deterring drug use *among the students tested*, as petitioners suggest. (Petition 10). The students tested were precisely those known by teachers and administrators to be without need of such deterrence. Rather, they adopted the policy to deter drug use among the student body generally.

[3] The School District exaggerates the evidentiary showing required by the Tenth Circuit to establish a safety concern among the tested group. (Petition 10). The Tenth Circuit, faced with evidence that the vast majority of activities at issue here pose no safety concern whatsoever, found that the scheme "too often" tested the wrong students. (Pet.App. 23a).

immediacy of the governmental concern is significantly diminished and the efficacy of addressing a drug problem by testing the group identified as the least likely to use drugs is minimal. (Pet.App. 24a). In recognition of the decreased governmental concern, the absence of safety risks involved, and the lack of efficacy of testing a group unlikely to use drugs, the Tenth Circuit found this testing scheme unconstitutional under the Fourth Amendment.

ARGUMENT

Reasons for Denying the Writ

Plenary review of this case is inappropriate for two reasons. First, the court of appeals correctly applied the legal principles announced by this Court in *Vernonia* in finding that suspicionless testing of students engaged in non-athletic extracurricular activities for drug use violated the Fourth Amendment. Second, plenary review should not be granted to resolve what the School District overstates as a conflict with either the Seventh Circuit's opinion in *Todd v. Rush County Schools*, 133 F.3d 984 (7th Cir. 1998), or the Eighth Circuit's opinion in *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999). The latter case was later vacated and is thus of questionable legal authority. The former case, which did not undertake an analysis of the *Vernonia* factors, has been seriously criticized within the very circuit which issued it.

I. The Tenth Circuit Correctly Applied The Legal Principles That Have Been Clearly Established By This Court's Legal Precedents In Finding That This Drug Testing Policy, Based On No Evidence That The Targeted Group Engaged In Drug Use Or Posed A Safety Threat, Was An Unreasonable Search Under The Fourth Amendment.

To overcome the Fourth Amendment protections of millions of students in our public schools requires much more than a speculative attempt to deter generalized drug use or a broad desire to convey an anti-drug message used to justify the drug testing policy in Tecumseh schools. Drug testing for all students would run counter to the Court's longstanding promise that "students do not shed their constitutional rights . . . at the schoolhouse door." *Vernonia*, 515 U.S. at 655-56 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). Vital to those constitutional rights is the Fourth Amendment's guarantee that any search of students presumptively must be "based on individualized suspicion of wrongdoing." *Id.* at 653. This Court has narrowly circumscribed the instances where departure from these normal constitutional safeguards is allowed, reserving them for extraordinary circumstances where drug use either reached epidemic proportions or posed a particular and severe danger. *See Chandler v. Miller*, 520 U.S. 305, 314-18 (1997); *see also Ferguson v. City of Charleston*, 121 S.Ct. 1281, 1288 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). Expanding *Vernonia*'s careful analysis to allow drug testing of any group in which a large number of students may be found would render the Fourth Amendment meaningless in the context of public schools.

In evaluating the Tecumseh drug testing policy, the Tenth Circuit underwent a careful and measured analysis of the legal principles announced by this Court in *Vernonia*. In *Vernonia*, this Court identified four factors to be balanced in evaluating the constitutionality of the challenged school drug testing policy: 1) the nature of the privacy interest upon which the search intrudes; 2) the nature and character of the intrusion; 3) the nature and immediacy of the governmental interest at issue; and 4) the efficacy of the drug testing scheme as a means for addressing the drug problem. *Vernonia*, 515 U.S. at 654, 658, 660. Based on this analysis, the Tenth Circuit struck down drug testing for a group of students who are the least likely to use drugs, who have no proven history of drug use, who engage in no dangerous activities, and who attend a school with an overall minimal drug problem. In order to justify a drug testing policy, a school district in the Tenth Circuit must "demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem." (Pet.App. 25a).

Although the School District agrees upon the Tenth Circuit's use of *Vernonia* factors as the applicable legal standard (Petition 19), petitioners nonetheless argue that the Tenth Circuit's decision conflicts with the holding of *Vernonia*. The School District plainly misreads *Vernonia* as standing for the sweeping proposition that suspicionless drug testing of any group of students is allowed, even absent any evidence that an actual drug problem exists

among the tested students, that the group faces any particular safety concerns, or that the testing scheme attacks a drug problem at all.

Each of the School District's disagreements with the Tenth Circuit would render this Court's careful analysis of that case into many wasted words.[4] The holding of *Vernonia* turns upon finding a congruence of at least five factors, which in combination justified suspension of normal Fourth Amendment rules: 1) student athletes were "the leaders of the drug culture," 515 U.S. at 649; 2) these athletes were imitated as role models by other students, *id.* at 663; 3) the rampant and unchecked substance abuse by these athletes fueled an "immediate crisis" in a "drug-infested school," *id.* at 649, 662-63; 4) drug use by these athletes could and did cause severe injury on the playing field, *id.*; and 5) these athletes have even less of a legitimate privacy expectation than other students, because of communal undress and showering required for athletic participation and because athletes are subject to preseason physical exams. *Id.* at 657.

This Court's subsequent references to *Vernonia* underscore the narrow holding of that case. In *Chandler*, the Court wrote that the "immediate crisis" caused by "a sharp rise in students' use of unlawful drugs in *Vernonia* bolstered the government's and school officials' arguments that drug-testing programs were warranted and

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[4] As the Supreme Court has explained, "the care this Court took to explain why the needs in *Skinner*, *Von Raab*, and *Vernonia* ranked as 'special' " would be "wasted" if other, more generalized concerns could be invoked to justify exceptions to the Fourth Amendment. *Chandler*, 520 U.S. at 322.

appropriate." *Chandler*, 520 U.S. at 316, 319. Here, in contrast, the choir and band members have no history of drug use, engage in no dangerous activities, and give no indication that their social behavior is imitated by other students. In fact, the Tecumseh School Board, by targeting activities such as Band, Choir and Academic Team, have picked the students *least* likely to use drugs, *least* likely to lead to injury, and *least* likely to provoke drug use among other students. The Tenth Circuit strictly adhered to this Court's detailed analysis in *Vernonia* in finding this policy unreasonable under the Fourth Amendment.

In evaluating the privacy expectations of the student-athletes in *Vernonia* schools, this Court emphasized that athletes engage in communal undress and submit to various regulations, including acquisition of insurance coverage, maintenance of a minimum grade point average, and compliance with the coach's rules of conduct, dress and schedule, that diminish privacy expectations among athletes. *Vernonia*, 515 U.S. at 577. The Tenth Circuit correctly found that the privacy expectations of students here are constrained in only "some small way." (Pet.App. 21a). These students do not submit to invasive physical exams and are not required to obtain insurance coverage (Pet.App. 21a), and although not relied upon by the Tenth Circuit, participation in activities such as Choir or Band does not require communal undress. (Pet.App. 20a). The Tenth Circuit then found that voluntary participation in these activities alone does not lower privacy expectations, as citizens voluntarily engage in activities every day – from employment to running for office – without an automatic reduction of their constitutional rights.

(Pet.App. 20a-21a). The only similarity between the students here and the athletes in *Vernonia* is that their conduct is sometimes regulated in a minor manner by the rules set by a coach. (Pet.App. 21a).

As for the character of the intrusion, this Court in *Vernonia* has addressed the degree of intrusion of a well-conducted urine analysis. 515 U.S. at 658. Although not relied upon by the Tenth Circuit, the Tecumseh testing process is more intrusive than the policy in *Vernonia*. Access to the results of the test in *Vernonia* were strictly limited to certain administrators and athletic directors; the Tecumseh policy is not so carefully limited, as the policy allows the results to be revealed to anyone with a "need to know," a term that is not defined in the policy. (Pet.App. 72a). Furthermore, although the Policy purports to protect the confidentiality of the list of medical prescriptions submitted by students, such confidentiality is not respected in practice. For example, a teacher admitted to reading the students' lists of prescriptions and leaving the lists unattended in an unsealed envelope. (Pet.App. 73a).

In evaluating the nature of the governmental concern, the Tenth Circuit adhered closely to this Court's *Vernonia* decision in light of the facts in the Tecumseh schools. Just as in *Vernonia*, the Tenth Circuit acknowledged the general importance of deterrence of drug use in schools, but also recognized that the particular safety concerns related to athletes played a key role in establishing a governmental need sufficient to justify suspension of Fourth Amendment rights in *Vernonia*. (Pet.App. 22a-23a). Unlike *Vernonia*, these safety concerns are

wholly absent for students participating in non-athletic activities such as Choir and Academic Team.

Petitioners complain that the Tenth Circuit requires school districts to demonstrate that the targeted activity must carry a special risk of injury before safety can be considered a governmental concern sufficient to invade the privacy rights of students. (Petition 21). Such a showing, however, is completely consistent with this Court's repeated emphasis of the presence of concrete and particularized threats to safety in its special needs precedents. This Court stressed that the governmental interest in the *Vernonia* drug testing program was justifiable because "the program is directed *more narrowly* to drug use by student athletes, where the *risk of immediate physical harm* to the drug user or those with whom he is playing *is particularly high.*" *Vernonia*, 515 U.S. at 662 (emphasis added). Justice Ginsburg's concurrence again emphasized the unique safety concerns faced by student athletes. *Id.* at 666. And only this past term, Justice Kennedy described *Vernonia* as resting, not merely upon generalized concern for student drug use, but upon the specific harms facing the students actually targeted under the *Vernonia* policy:

> we sustained the [drug testing] policy as furthering . . . the policy's ultimate goal: "deterring drug use by our Nation's schoolchildren," and *particularly by student-athletes, because "the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high."* Id. at 661-662.

Ferguson, 121 S.Ct at 1293 (Kennedy, J., concurring) (emphasis added; quoting *Vernonia*, 515 U.S. at 661-62);

see also Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 628 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 670 (1989).

Where, as here, the vast majority of activities covered by the drug testing policy involve absolutely no safety concerns, the court of appeals correctly discounted such alleged concerns put forward by the district. By so holding, the Tenth Circuit did not, as petitioners assert, completely exclude safety as a legitimate governmental concern. Rather, the decision merely requires that if the purported justification of targeting a specific group for drug testing is based on safety concerns, there must be some demonstration that safety is, unlike here, actually a concern. If general characteristics of the student body as a whole can be used to justify targeting a specific group of students for drug testing, as the School District asserts, all students could be tested, a result which this Court has specifically cautioned against.[5] *See Vernonia*, 515 U.S. at 662, 666.

As for the immediacy of the school's concerns, the School District "readily admit[s]" that a state of rebellion fueled by drug use does not exist in the Tecumseh schools. (Petition 23). The court of appeals correctly emphasized the Supreme Court's repeated references to the serious drug problem among athletes in that case: the

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[5] The same is true for petitioners' argument regarding the levels of supervision. (Petition 22). In order to justify targeting these students for testing, the Tenth Circuit followed *Vernonia*'s emphasis of the characteristics that *distinguished* athletes from the student body as a whole.

"sharp increase in drug use," "more disciplinary problems," the fact that "athletes were the leaders of the drug culture," the "administration was at its wits end," "a large segment of student body, particularly those involved in interscholastic athletics, was in a state of rebellion," disciplinary actions were "epidemic," there was a "threefold increase in classroom disruptions and disciplinary reports," the staff's direct observations of students using drugs, and a "rebellion fueled by alcohol and drug use." (Pet.App. 55a) (quoting *Vernonia*, 515 U.S. at 648-49). Given the almost complete absence of any drug problem at all in Tecumseh, the court of appeals correctly held that the immediacy of the governmental concern is significantly diminished.

The School District would have the Tenth Circuit dispense with this Court's repeated, consistent findings of a serious drug problem as immaterial to the holding in *Vernonia*[6] and argue that instead, this Court's passing citations to *Von Raab* and *Skinner* justify suspicionless drug testing of students without any documentation of identifiable drug use. (Petition 23). However, the *Vernonia* Court referenced the allowance of the suspicionless searches in *Von Raab* and *Skinner* within the context of describing the immediate crisis existing in the Vernonia

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[6] The School District attempts to ignore this Court's findings that the drug use documented in *Vernonia* had reached epidemic proportions by referencing the Ninth Circuit's finding that drug use in Vernonia schools was not extensive. (Petition 14 n.17). It is clear, however, that this Court's analysis of the Vernonia testing policy focused on the findings by the district court that the level of drug usage had reached an "immediate crisis" of "epidemic proportions." *Vernonia*, 51 U.S. at 581.

schools, which is, by petitioners' own admission, nonexistent in the Tecumseh schools. A straightforward reading of both *Von Raab* and *Skinner* reveals that neither case stands for the broad invitation to suspicionless searches proposed by the School District. Both *Von Raab* and *Skinner*, unlike the situation here, involved circumstances of extreme threats to safety. *Von Raab*, 489 U.S. at 674 (justifying drug testing based on "extraordinary safety and national security hazards"); *Skinner*, 489 U.S. at 628 (justifying drug testing based on potential for "great human loss" that could be caused by drug-impaired employee); *see also Chandler*, 520 U.S. at 319-22 (emphasizing the special safety context of both cases and further emphasizing documented history of drug use in *Skinner* and *Vernonia* as important to warrant suspicionless drug testing programs). This Court's legal precedent unmistakably relies upon historical drug use among the targeted students as a critical element in its decision.[7]

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[7] Petitioners overstate the evidentiary requirements announced by this holding in *Earls*. Nowhere does the Tenth Circuit suggest that there be a "fixed minimum quantum of drug use" (Petition 23) before testing may occur. In fact, it explicitly eschewed a "bright-line" rule and instead granted each school district the flexibility and authority to determine when such testing becomes necessary. Nor does the Tenth Circuit require individual detection of actual drug users. (Petition 24). In this case, however, the level of drug use *was* identified among the targeted group and that quantum, universally agreed upon, was negligible.

Nor does the Tenth Circuit require school officials to flout "reason and common sense" to justify a drug testing program. Rather, it found that where, as here, the only evidence of a drug problem rests on anecdotes dating as far back as 1970 and hearsay about the student population at large, students'

Finally, in *Vernonia*, it was "self-evident that a drug problem largely fueled by the 'role model' effect of *athletes'* drug use, and of particular danger to *athletes*, is effectively addressed by making sure that *athletes* do not use drugs." 515 U.S. at 663 (emphasis added). Here, in stark contrast, it is wholly illogical to attempt to address a drug problem by testing those students least likely to use drugs. Indeed, this scheme does not even test for the substances, tobacco and alcohol, that are known to be the most serious problems among Tecumseh students.

Given these facts, the Tenth Circuit's decision that where, as here, the government lacks any special safety concerns, the students tested have been identified as those not likely to use drugs, and the student body in general does not have a problem with drugs, a suspicionless drug testing scheme is unconstitutional, is completely consistent with this Court's *Vernonia* analysis.[8]

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countervailing Fourth Amendment rights prevent targeting a group of students that have been clearly identified as the least likely to use drugs.

[8] The School District argues that the Tenth Circuit's opinion, in leaving school boards the discretion to evaluate their own drug problems, lacks sufficient guidance in determining when student drug testing is acceptable. (Petition 24). Apparently, the District seeks a bright-line rule, but can propose only the plainly unacceptable line that a school can dispense entirely with demonstrating a cognizable interest in testing based on demonstrated realities. The special needs test turns upon balancing – a concept that is, by definition, fact-specific and that does not lend itself to the kind of rigid certainty petitioners seek.

Not only is the Tenth Circuit's opinion correctly decided under the *Vernonia* balancing analysis, this outcome is also mandated by this Court's subsequent decision in *Chandler v. Miller*, 520 U.S. 305.[9] In *Chandler*, this Court more clearly defined the contours of the special needs doctrine under which the requirement of individualized suspicion may be dispensed with. This Court stressed that the government must *first* make a showing of a substantial special need *before* the government's interests may be balanced against the individual's privacy interests. *Id.* at 318. Where, as here, the government fails to present "any indication of a *concrete* danger demanding departure from the Fourth Amendment's main rule," *id.* at 319 (emphasis added), based on either a documented history of drug use or a substantial public safety threat, or that the test will prove effective in identifying drug use, *id.*, the testing scheme must be struck down, no matter how "well-meant" or "conveniently arranged." *Id.* at 322, 323. Any contrary rule would lead to suspicionless and unfettered drug testing of any citizen with lowered privacy expectations on the flimsiest of excuses.

The students tested under the Tecumseh scheme completely lack any of the attributes that could give rise to special needs under *Chandler*. There exists no documentation of drug use among the tested students, no particular concern over safety, and no effectiveness of a

[9] Although the Tenth Circuit declined to explicitly incorporate *Chandler* in its analysis, the Tenth Circuit's resulting decision, that a school must base a drug testing scheme on "demonstrated realities," is consistent with *Chandler*.

drug test that targets those least likely to use drugs. Indeed, as the School District has admitted in prior proceedings, the purpose of this drug testing program is merely symbolic. However, the lesson of *Chandler* is clear: a desire to convey a symbolic message against drug use is insufficient to establish a "special" need. *Id.* at 321.

Whether under the *Vernonia* or *Chandler* analysis, the mere entrance through the schoolhouse gates does not include the blanket invitation to subject students in America's public schools to drug tests. Following the logic of the School District – that a general deterrence scheme can justify testing any large segment of the student population, with no requirement to establish special safety concerns or an identifiable drug problem among those tested – would lead down a slippery slope until, ultimately, all students would be required to shed their Fourth Amendment protection against unreasonable searches as a condition for entrance to school.[10] Such a condition is clearly impermissible under the Constitution and this Court's longstanding precedent. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

[10] The School District further argues that "local control" of schools justifies suspension of students' Fourth Amendment rights. (Petition 25-26). As this Court has consistently recognized, however, the Constitution protects the rights of students, even against local school officials. *See Vernonia*, 515 U.S. at 652; *T.L.O.*, 469 U.S. at 336-37. In fact, by allowing school districts to determine when a drug test becomes necessary, the Tenth Circuit's decision is respectful of the authority and discretion of local school officials.

II. Petitioners Overstate The Conflict Existing Among The Circuits.

Although the Tenth Circuit opinion departs from the holdings of the Seventh Circuit in *Todd v. Rush County Schools*, 133 F.3d 984, and the Eighth Circuit in *Miller v. Wilkes*, 172 F.3d 574, the School District overstates the degree of the conflict. Other panels in the Seventh Circuit have criticized the earlier holding in *Todd* and the Eighth Circuit has since vacated its decision in *Miller*. By contrast, the Tenth Circuit's opinion lies squarely within the mainstream of judicial precedents in the nation.

In *Miller*, the Eighth Circuit upheld a suspicionless drug testing policy directed at students participating in extracurricular activities despite a finding of no drug use among the student body. In reviewing the *Vernonia* factors, the Eighth Circuit relied only on a general concern about drug use among students nationally to justify the nature and immediacy of the governmental interest. *Miller*, 172 F.2d at 580-82. However, the Eighth Circuit later vacated this decision as moot, *see Miller v. Wilkes*, 1999 U.S. App. LEXIS 13289 (8th Cir.), and therefore this decision is not considered precedent in the Eighth Circuit. *See* U.S. Ct. App. 8th Cir. Rule 28(A)(i).

In *Todd*, the Seventh Circuit upheld a suspicionless drug testing policy aimed, in part, at students involved in extracurricular activities. Based on only a cursory review of *Vernonia*, the *Todd* court upheld the policy on the summary findings that general deterrence served a sufficient governmental interest, that successful extracurricular activities requires healthy students, and that

extracurricular activities were privileges. *Todd*, 133 F.3d at 986-87. However, the soundness of this decision has been significantly questioned within the Seventh Circuit.

In *Willis v. Anderson Community School Corporation*, 158 F.3d 415 (7th Cir. 1998), *cert. denied*, 526 U.S. 1019 (1999), another panel of the Seventh Circuit held that, unlike *Todd*, "simply invoking the importance of deterrence is insufficient. Instead, it is necessary to closely examine both the nature of the government's concern and the efficacy of the policy *in this particular case*. . . . " *Id.* at 423 (emphasis in original). The court specifically warned that "one insidious means towards blanket testing is to divide students into broad categories . . . and then sanction drug testing on a category by category basis." *Id.*

Another panel of the Seventh Circuit, in reviewing its prior decision in *Todd*, severely criticized the holding in *Todd*. Recognizing that *Todd* did not even employ the methodology presented by this Court in *Vernonia*, the panel stated that, but for *stare decisis* considerations, "we would not sustain the random drug . . . testing of students seeking to participate in [non-athletic] extracurricular activities." *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052, 1062 (7th Cir. 2000). Although ultimately upholding a testing program similar to that at issue in *Todd*, the *Joy* court underwent a thorough analysis of each of the *Vernonia* factors. In its review, the *Joy* court repeated the holding in *Willis* that, unlike the holding in *Todd*, general deterrence is simply insufficient to establish a governmental concern warranting the suspension of general Fourth Amendment requirements. *Id.* at 1064. The *Joy* court also found that the lack of correlation between drug use and the students tested as well as the absence of

any safety-related concerns established that the government had not satisfied the immediacy or efficacy factors of the *Vernonia* test. Clearly, after *Joy* and *Willis*, the *Todd* decision stands on shaky grounds even within the circuit that issued the opinion.

As the Tenth Circuit documented, its holding and analysis is consistent with all remaining lower court decisions. *See, e.g., Gardner v. Tulia Indep. Sch. Dist.*, 2000 U.S. Dist. LEXIS 20253 (N.D. Tex. 2000); *Tannahill v. Lockney Indep. Sch. Dist.*, 133 F. Supp. 2d 919 (N.D. Tex. 2001); *see also, e.g., Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095 (Colo. 1998) (applying federal constitution).

CONCLUSION

Certiorari is not warranted. The Tenth Circuit's holding conforms to this Court's legal precedents defining the scope of suspicionless drug testing schemes. The School District proposes a drug testing scheme that would summarily brush aside constitutional protections of students in a manner never imaginable under this Court's rulings. Moreover, given the uncertain legal status of the conflicting circuit decisions, plenary review is not warranted at this time.

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Dated: September 24, 2001

(17)

No. 01-332

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY and INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY,
Petitioners,

v.

LINDSAY EARLS and LACEY EARLS, minors, by their next Friends and parents, John David and Lori Earls, and DANIEL JAMES, a minor, by his next friend and mother, Leta Hagar,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 24, 2001
CETIORARI GRANTED NOVEMBER 8, 2001

210 pp

TABLE OF CONTENTS

	Page
Relevant Docket Entries in Lindsay Earls, a Minor, by Her next Friends and Parents, John David and Lori Earls, and Daniel James, by his next friend and mother, Leta Hagar vs. Board of Education of Tecumseh Public School District, Independent School District No. 92 of Pottawatomie County, and Tecumseh Public School District, Independent School District No. 92 of Pottawatomie County, United States District Court for the Western District of Oklahoma, Case No. CIV-99-1213-R, and all appellate proceedings therein	1
Complaint For Declaratory and Injunctive Relief (August 18, 1999)	7
Defendants' Answer (August 24, 1999)	30
Defendants' Responses To Plaintiff's Interrogatories, First Set	42
Defendants' Responses To Plaintiffs' Requests For Admissions, First Set	61
Affidavit of Nancy Warwick, Teacher and Coach of Academic Team at Tecumseh Schools	68
Affidavit of David Weaver, Vice President and Co-Owner of Drugs of Abuse Testing Laboratory, Inc.	70
Excerpts from Transcript of Deposition of Dean Rogers, President of the Board of Education of Tecumseh Schools	72
Excerpts from Transcript of Deposition of James Blue, Principal of Tecumseh High School	101
Excerpts from Transcript of Deposition of Grant Gower, Athletic Director at Tecumseh Schools	107
Excerpts from Transcript of Deposition of Lindsay Earls, Respondent	108

TABLE OF CONTENTS—Continued

Page

Excerpts from Transcript of Deposition of Sheila Evans, Future Homemakers of America Teacher and Coach at Tecumseh Schools 115

Excerpts from Transcript of Deposition of Danny Sterling, Future Farmers of America Teacher and Coach at Tecumseh Schools 116

Excerpts from Transcript of Deposition of Daniel James, Respondent 121

Excerpts from Transcript of Deposition of Carolyn Daugherty, Vocal Teacher and Coach at Tecumseh Schools 125

Excerpts from Transcript of Deposition of Danny Jacobs, Assistant Superintendent at Tecumseh Schools 135

Excerpts from Transcript of Second Deposition of Danny Jacobs, Assistant Superintendent at Tecumseh Schools 155

Excerpts from the Tecumseh High School Academic Planning Guide 158

1989-90 Tecumseh School's Application for Funds Under the Drug-Free Schools and Communities Act of 1986 163

1990-91 Tecumseh School's Application for Funds Under the Drug-Free Schools and Communities Act of 1986 167

1991-92 Tecumseh School's Application for Funds Under the Drug-Free Schools and Communities Act of 1986 170

1994, 1995 and 1996 Tecumseh School's Application for Funds Under the Drug-Free Schools and Communities Act of 1986 175

TABLE OF CONTENTS—Continued

Page

1995-96 Tecumseh School's Application for Funds Under the Drug-Free Schools and Communities Act of 1986 178

1996-97 Tecumseh School's Application for Funds Under the Drug-Free Schools and Communities Act of 1986 184

1997-98 Tecumseh School's Application for Funds Under the Drug-Free Schools and Communities Act of 1986 188

1998-99 Tecumseh School's Application for Funds Under the Drug-Free Schools and Communities Act of 1986 190

Tecumseh Public Schools Student Activities Drug Testing Policy 193

The following may be found in the Petition for Writ of Certiorari where indicated and are omitted from the Joint Appendix pursuant to Supreme Court Rule 26.1:

Opinion of the United States Court of Appeals for the Tenth Circuit Issued March 21, 2001 ..... Pet. App. A at 1a

Order of the United States Court of Appeals for the Tenth Circuit Denying Petition for Rehearing and Suggestion for Rehearing En Banc issued May 30, 2001 ..... Pet. App. B at 46a

Order of the United States Court of Appeals for the Tenth Circuit Granting Appellants' Application for Appeal Related Attorneys Fees, Costs and Expenses issued July 3, 2001 ..... Pet. App. C at 47a

Order of the United States District Court for the Western District of Oklahoma Granting Defendants' and Denying Plaintiffs' Motion for Summary Judgment issued March 9, 2000 ..... Pet. App. D at 50a

TABLE OF CONTENTS—Continued

Page

Judgment of the United States District Court for the Western District of Oklahoma in Favor of the Defendants and Against the Plaintiffs issued March 9, 2000..... Pet. App. E at 79a

Amended Judgment of the United States District Court for the Western District of Oklahoma in Favor of Defendants and Against Plaintiffs issued March 24, 2000.....Pet. App. F at 80a

IN THE

Supreme Court of the United States

No. 01-332

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY and INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY,
Petitioners,

v.

LINDSAY EARLS and LACEY EARLS, minors, by their next friends and parents, John David and Lori Earls, and DANIEL JAMES, a minor, by his next friend and mother, Leta Hagar,
Respondents.

DOCKET ENTRIES

DATE	PROCEEDINGS
8/18/1999	Respondents file Complaint for Declaratory and Injunctive Relief in the United States District Court for the Western District of Oklahoma
8/24/1999	Answer to Complaint filed by Petitioners
11/17/1999	Motion for Summary Judgment and Brief in Support filed by Petitioners
12/8/1999	Brief Amici Curiae by Washington Legal Foundation; Sen. Don Nickles; Sen. Judd Gregg; Gov. Frank Keating; Rep. Fred S. Morgan; Oklahoma Secondary Schools Activities Association; Allied Educational Foundation; Gayla D. Duke; Rhonda Ellard; Debra Fletcher; Bobbette Hamilton; Jimmy and Sheila Jordan; Michael and Kim

DATE	PROCEEDINGS
	Rawls; Stewart and Roshel Stabel; Kenneth A. Stanley; Kris Steele; Clyde L. and Gail A. Topping; Mike and Valerie Tucker; Steve and Lynne Young filed in support of Petitioners regarding Motion for Summary Judgment
12/28/1999	Response in Opposition to Motion for Summary Judgment filed by Respondents
12/28/1999	Motion for Summary Judgment and Brief in Support filed by Respondents
12/28/1999	Appendix, Volumes I and II, filed by Respondents regarding Motion for Summary Judgment filed by Respondents
1/24/2000	Petitioners file Reply to Respondents' Response in Opposition to Petitioners' Motion for Summary Judgment
1/24/2000	Petitioners file Response to Respondents' Motion for Summary Judgment
1/31/2000	Respondents file Reply to Petitioners' Response to Respondents' Motion for Summary Judgment
3/1/2000	Parties file Joint Pre-Trial Report
3/1/2000	Petitioners file Proposed Findings of Fact and Conclusions of Law and Trial Brief
3/1/2000	Respondents file Proposed Findings of Fact and Conclusions of Law and Trial Brief
3/1/2000	Respondents file Motion in Limine re: Hearsay Evidence of Drug Use and Memorandum of Points and Authorities in Support

DATE	PROCEEDINGS
3/1/2000	Respondents file Motion in Limine re Relevancy of Parents' Testimony and Memorandum of Points and Authorities in Support
3/2/2000	Order of Honorable David L. Russell approving the final pre-trial report.
3/8/2000	Petitioners file Response in Opposition to Petitioners' Motion in Limine re: Relevancy of Parents' Testimony
3/8/2000	Petitioners file Response in Opposition to Petitioners' Motion in Limine re: Hearsay Evidence of Drug Use
3/9/2000	Order by Honorable David L Russell denying Respondents' Motion for Summary Judgment and granting Petitioners' Motion for Summary Judgment
3/9/2000	Entry of Judgment by Honorable David L. Russell in favor of Petitioners and against Respondents, terminating the case
3/21/2000	Respondents file Motion for Order to Add Plaintiff Lacey Earls, or in the alternative to Amend the Complaint, and to Amend the Judgment and Affidavits of David Earls and Lacey Earls in Support
11/24/2000	Order by Honorable David L. Russell granting Respondents' Motion for Order to add Plaintiff Lacey Earls, granting Respondents' Motion to Amend the Complaint, and to Amend the Judgment

DATE	PROCEEDINGS
3/24/2000	Entry of Amended Judgment by Honorable David L. Russell that judgment is entered in favor of Respondents and against Petitioners, Lindsay Earls, a minor, by her next friends and parents, John David and Lori Earls; Daniel James, a minor, by his next friend and mother, Leta Hagar; and Lacey Earls, a minor, by her next friends and parents, John David and Lori Earls.
4/10/2000	Respondents file Notice of Appeal
4/12/2000	Civil case docketed by 10th Circuit Court of Appeals and Preliminary Record Filed
4/19/2000	Respondents file Docketing Statement
8/1/2000	Respondents file Brief in Chief
8/8/2000	Amicus Curiae Brief in Support of Respondents filed by The American Public Health Association; The National Association of Social Workers; The National Association of Social Workers–Oklahoma Chapter; The Center for Law and Education; The National Center for Youth Law; The Juvenile Law Center; The Loyola Childlaw Center; Advocates for Children of New York; Lawyers for Children; Covenant House New Jersey; Professor Martin Guggenheim and Professor Randy Hertz
8/29/2000	Petitioners file Brief in Chief
9/6/2000	Amicus Curiae Brief in Support of Petitioners filed by Oklahoma State School Boards' Association and National School Boards' Association.

DATE	PROCEEDINGS
9/9/2000	Amicus Curiae Brief in Support of Petitioners filed by Washington Legal Foundation; Sen. Don Nickles; Sen. Judd Gregg; Gov. Frank Keating; Rep. Fred S. Morgan; Oklahoma Secondary Schools Activities Association; Allied Educational Foundation; Gayla D. Duke; Rhonda Ellard; Debra Fletcher; Bobbette Hamilton; Jimmy and Sheila Jordan; Michael and Kim Rawls; Stewart and Roshel Stabel; Kenneth A. Stanley; Kris Steele; Clyde L. and Gail A. Topping; Mike and Valerie Tucker; Steve and Lynne Young.
9/18/2000	Respondents file Reply Brief
1/24/2001	Case argued by Graham A. Boyd for Respondents and Linda M. Meoli for Petitioners and case submitted to Judges Brorby, Anderson and Ebel
1/25/2001	Motion filed by American Academy of Pediatrics for leave to become additional signatory to the pending brief of the amici curiae in support of the Respondents
1/31/2001	Order by Judges Brorby, Anderson and Ebel granting Motion of American Academy of Pediatrics to become amicus
3/5/2001	Respondents file supplemental authority
3/14/2001	Petitioners file response to Respondents' supplemental authority

DATE	PROCEEDINGS
3/21/2001	Order reversing and remanding of the Court of Appeals for the Tenth Circuit written, signed and published, authoring Judge Brorby, joined by Judge Anderson; Judge Ebel dissenting
4/4/2001	Petitioners file Petition for Rehearing and Suggestion for Rehearing En Banc
4/6/2001	Order for Respondents to file Response to Petition for Rehearing with Suggestion for Rehearing En Banc filed by Judges Brorby, Anderson and Murphy
4/30/2001	Respondents file Response to Petition for Rehearing and Suggestion for Rehearing En Banc
5/30/2001	Order Denying Rehearing and Suggestion for Rehearing En Banc filed by Judges Brorby, Anderson and Ebel. Judge Ebel voted to grant rehearing
6/7/2001	Mandate issued
8/24/2001	Petitioners file Petition for Writ of Certiorari in the United States Supreme Court
9/24/2001	Brief of Respondents in Opposition to Petition for Writ of Certiorari Filed
11/8/2001	Petition for Certiorari Granted
11/28/2001	Record Filed

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-99-1213-R

LINDSAY EARLS, a minor, by her next friends and parents, John David and Lori Earls, and DANIEL JAMES, by his next friend and mother, Leta Hagar,

Plaintiffs,

v.

BOARD OF EDUCATION OF TECUMSEH PUBLIC SCHOOL DISTRICT, Independent School District No. 92 of Pottawatomie County, and TECUMSEH PUBLIC SCHOOL DISTRICT, Independent School District No. 92 of Pottawatomie County,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Filed August 18, 1999

(Violation of Fourth Amendment Civil Rights)

Plaintiffs Lindsay Earls and Daniel James, by their next friends and parents, on information and belief, hereby allege:

I.

INTRODUCTION

1. This suit seeks a declaration that students attending a public school have the right, protected by the Fourth and Fourteenth Amendments of the United States Constitution, to participate in non-athletic student activities without being required to submit to suspicionless drug testing. Plaintiffs in this action further seek appropriate injunctive relief protecting

them from the suspension or limitation of non-athletic student activities, and from any other punishment, due to their refusal to consent to, or pay for, any form of suspicionless drug testing. Under Oklahoma constitutional and statutory law, students have a right to a free, public education which is infringed upon by the actions of these defendants. Okla, Const. Art. 13, §1.

2. For years, the roughly 1,000 students at Tecumseh High School have had the benefit of participating in school-sponsored activities ranging from producing student newspapers and yearbooks to musical and academic endeavors such as choir and competitive quiz bowls. Most of the school's students participate in these activities, contributing not only to a diverse educational experience, but to a more well-balanced and responsible group of students. Student activities are critical to students' successful application to colleges and universities. Without a solid record of activities, even a student with excellent grades will be turned away from competitive universities. Until recently, Tecumseh High School's student activities were generally open to any students wishing to participate.

3. Beginning in October 1998, these requirements changed. With the implementation of the Student Activities Drug Testing Policy (hereinafter "Drug Testing Policy"), Tecumseh school officials now require all students who participate in certain enumerated activities to submit to suspicionless testing by urine sample for detection of illegal drugs, prescription drugs, and alcohol. Students must underwrite the cost of their own drug tests. As in many other schools, the Drug Testing Policy applies to athletic teams—a practice approved by the U.S. Supreme Court and not challenged here by plaintiffs. But Tecumseh school officials have gone the further step of drug testing participants in certain non-athletic student activities and students enrolled in academic classes linked to the student activities. For instance,

a student can take the choir class (a part of the school's regular curriculum) only if she also participates in the extra-curricular choir activities. Thus, the Drug Testing Policy effectively applies to parts of a public school's core, legally-required function—the education of its students. Any student who refuses to be tested for drugs and alcohol and to pay for such tests faces immediate termination from student activities and ejection from regular classes tied to those activities.

4. The School District has identified no special need to target students who do not participate in athletic activities for drug and alcohol testing. Rather, the policy expresses only a symbolic opposition to student drug and alcohol use. The testing methods used by the school is virtually useless in detecting past use of alcohol or most commonly abused drugs. By targeting a group of students who are relatively unlikely to use drugs on the basis of participation in activities that pose no special risks or physical dangers, the Drug Testing Policy neither addresses a proven problem nor promises to bring any benefit to students or the school. Instead, school officials have created a policy that causes substantial harms to its students. The policy discouraged from participation in student activities individuals who would otherwise benefit from experiences outside the strictly academic curriculum. Exclusion of students from these activities will seriously interfere with students' ability to gain college or university admission, affecting future employment, income, skills, and abilities. The harms caused by the policy will continue so long as defendants persist in implementing the current policy.

II.

PARTIES

5. Plaintiff Lindsay Earls is enrolled as a junior in Tecumseh High School, where she seeks to participate in non-athletic student activities subject to the school's Drug Testing Policy.

6. Plaintiff Daniel James is enrolled as a junior in Tecumseh High School, where he seeks to participate in non-athletic student activities subject to the school's Drug Testing Policy.

7. Defendant Board of Education of Tecumseh Public School District, Independent School District No. 92 of Pottawatomie County, is responsible for issuing, implementing, and enforcing the Student Activities Drug Testing Policy, which bars students from certain activities for which they are otherwise eligible unless they submit to testing of their urine for the presence of certain prohibited substances.

8. Defendant Tecumseh Public School District, Independent School District No. 92 of Pottawatomie County, is responsible for issuing, implementing, and enforcing the Student Activities Drug Testing Policy, which bars students from certain activities for which they are otherwise eligible unless they submit to testing of their urine for the presence of certain prohibited substances.

III.

JURISDICTION AND VENUE

9. This court has jurisdiction over all causes of action herein pursuant to 28 U.S.C. §§ 1331 and 1361. A cause of action for plaintiffs' claims is created by 42 U.S.C. § 1983.

10. Venue is proper in this court under 28 U.S.C. §1391(e).

IV.

FACTUAL BACKGROUND

A. *Non-athletic Student Activities Before Enactment of the Drug Testing Policy*

11. Tecumseh Public School District offers a host of student activities that complement the standard academic curriculum. Students are able to participate in activities

ranging from marching band to the French club, depending on their interests and abilities. Some of these activities contain a classroom component, which allows students to gain graded credit, including credits necessary in order to graduate.

12. Prior to October 1998, the requirements at Tecumseh High School for joining student activities depended on a student's academic performance, interest, and the specific nature of each individual activity. For athletic pursuits, such as football, the school required all participants to pass a certified physical exam in order to ensure that they met certain health requirements. Any additional requirements for participation depended on the selectivity and specific demands of the sport. For non-athletic activities, such as Academic Team and Choir, no physical or medical tests were required. Further, in contrast to athletic teams, non-athletic activities have never required communal undressing or other voluntary reductions in privacy.

B. *Events Leading to Enactment of the Student Activities Drug Testing Policy*

13. Tecumseh High School has been fortunate never to have experienced a period of suddenly increased drug or alcohol consumption. Drug use among high school students throughout the nation has steadily declined since 1996. Students who engage in school-sponsored activities are substantially less likely to use drugs than other students. Participants in band, orchestra, chorus, or the school play or musical exhibit the lowest drug or alcohol use of any group of students. No evidence suggests that Tecumseh diverges from these national trends. Indeed, the students who participate in non-athletic student activities at Tecumseh High School do not, as a group, have a reputation for or history of drug or alcohol use.

14. Two isolated events concerning athletes in Tecumseh's middle school triggered School District officials' decision to

"do something" about drugs. In 1996 or 1997 a group of eighth grade football players was accused of consuming prescription drugs, reportedly pills used to control blood pressure. Although these athletes were spared any injury, this incident gained notoriety among parents. The following year, a small quantity of marijuana was reportedly discovered in the middle school locker room and was said to belong to seventh grade football players.

15. Shortly after the incidents involving the middle school football players, several parents attended a school board meeting where they forcefully demanded a strong response to the threat of prescription drugs, illegal drugs, and alcohol. Directly responding to these parental demands, defendant School District proposed the Student Activities Drug Testing Policy.

A. *Provisions of the Drug Testing Policy*

16. Enacted in October 1998, the Drug Testing Policy created a mandatory, suspicionless drug and alcohol testing program with the stated purpose of "protect[ing] the health and safety of its extra-curricular activities students from illegal and/or performance-enhancing drug use and abuse, thereby setting an example for all other students of the Tecumseh Public School District."

17. Under the school's policy, each student participating in a covered activity must pay an annual fixed sum to subsidize the cost of his or her initial drug test and subsequent random drug testing. For the 1998-1999 academic year, the fixed sum was four dollars. For the 1999-2000 school year, the sum is five dollars. Students who refuse or are unable to pay the drug testing fee are ineligible to participate in student activities covered by the Drug Testing Policy or in the academic course associated with these activities.

18. The procedure for the Drug Testing Policy begins with a "Student Drug Testing Consent Form," which must be read,

signed and dated by the "activity student," his/her parent or custodial guardian, and the student's coach or sponsor. This form requires the activity student to agree to provide a urine sample "(a) as part of the student's annual physical or for eligibility for participation; (b) when the activity student is selected by the random selection basis to provide a urine sample; and (c) at any time when there is reasonable suspicion to test for illegal or performance-enhancing drugs." If a student has not returned the consent form with all of the requisite signatures and dates, he or she is prohibited from practicing or participating in any of the enumerated student activities.

19. The requirement of the Drug Testing Policy that each student pass an initial screening applies differently to athletic and non-athletic activities. For athletic team members, the Policy requires a urine test taken as part of the annual physical examination already required for such activities. For non-athletic activities such as Band or Academic Team, which have never required a physical examination or any other physical requirement, a urine test must be taken independently without a physical examination. The requirement of an initial urine test for all students was not enforced during the previous school year when the Policy first went into effect. Students have been told that all students participating in non-athletic activities subject to the Policy will be required to submit urine samples at the beginning of the 1999-2000 school year.

20. The second component of the Policy—random, suspicionless testing—takes place on a monthly basis. All students registered in either an "off-season" or "in-season" activity are placed on a list, and the Tecumseh Public School District determines the number of students to be chosen randomly from that list for testing in a given month.

21. Finally, the Student Activities Drug Testing Policy provides for testing of any activity student when an school administrator, coach, or sponsor has "reasonable suspicion of illegal or performance-enhancing drug use by that particular student." This element of the policy is not challenged here by Plaintiffs.

22. According to the Policy, urine tests should be conducted in "a restroom or other private facility behind a closed stall" and should be personally monitored by a school employee designated by the principal. The Policy provides that the monitor "shall not observe the student while the specimen is being produced, but . . . shall be present outside the stall to listen for the normal sounds of urination in order to guard against tampered specimens and to insure an accurate chain of custody."

23. The Drug Testing Policy sets forth the following protocol for analyzing students' urine and for responding to a positive test result. Students' urine is initially analyzed using the immunoassay methodology. A positive test result in the initial urine test is subject to confirmation by a second test of the same specimen using Gas Chromatograph/Mass Spectrometry ("GC/MS") methodology. If the GC/MS test reveals a positive result, the laboratory notifies the school principal or designee, who then notifies the student, the head coach or sponsor of the relevant activity, and the student's parent or guardian. The Policy allows notification of other school personnel who have an unspecified "need to know" but directs that the results are not to be given to law enforcement authorities. If the student wishes to challenge the results and request a review by the Superintendent, he or she is given five calendar days to submit a written appeal to the Superintendent, during which time the student may continue to participate in extra-curricular activities. The Superintendent or his/her designee makes the final determination of whether

the original finding was justified, and his or her decision is not subject to further review.

24. According to the Policy, the consequence of a positive test result depends on the number of prior offenses. For the first offense, the student's parent or guardian is contacted and a meeting is arranged to include the student, the parent/guardian, the athletic director or sponsor, and the principal. The student may continue to participate in the extra-curricular activity if, within five days of this meeting, (1) the student and parent/guardian show proof that the student has received drug counseling from a qualified entity, and (2) the student submits to a second drug test administered within two weeks of the meeting. For the second offence, the student is suspended from participation in all extra-curricular activities (including meetings, practices, scrimmages, and competitions) for fourteen calendar days and must successfully complete four hours of substance abuse counseling. Thereafter, the student must submit to monthly tests at times and dates chosen at random by the principal or designee. After a third offense, the student is suspended completely from participating in any extra-curricular activity "for the remainder of the school year, or eighty-eight school days (1 semester), whichever is the longer."

D. *The Application of the Drug Testing Policy to Plaintiffs*

25. Plaintiff Lindsay Earls has previously participated in the school's Academic Team, Choir, Show Choir, Marching Band, Beta Club and National Honor Society. Ms. Earls desires to continue participating in these activities and to enroll in academic classes connected with Academic Team, Choir, Show Choir, Marching Band during the 1999-2000 school year. She will be permitted to continue as a member of the Beta Club and National Honor Society, but she will be ineligible to engage in her other student activities and will be expelled from the connected curricular classes under the

school's Drug Testing Policy unless she submits to the school's program of suspicionless drug testing. Ms. Earls plans to use her choir and band class credits to meet the school's graduation requirement that she complete a fine arts class. She does not wish to pursue non-musical or non-performance classes to meet this requirement. Indeed, she is considering music as a college major and plans to apply for music scholarships. Defendants' Policy would exclude Ms. Earls from her chosen activities and classes and would effectively foreclose her ability to major in music or receive music scholarships solely because she objects to providing her urine on demand to school officials for drug testing. She has met every other criteria for participation in her chosen activities and for enrollment in her chosen classes. Ms. Earls aspires to attend a competitive university after she graduates from high school and wishes to increase her academic skills and musical talents. She fears, however, that exclusion from student activities and classes will jeopardize her future plans and aspirations.

26. During the 1998-99 school year, Ms. Earls was coerced into consenting to the school's drug testing program, and she did so only in order to avoid being barred from student activities and associated classes. In October 1998, she completed a consent form, including a list of her prescription drugs, and submitted the form to Mrs. Warwick, the Academic Team advisor. Ms. Earls does not know whether the form was placed in a sealed envelope, as called for by the Policy. An initial drug screening was not required for participation on the Academic Team for the 1998-1999 school year, since the Drug Testing Policy took effect mid-year.

27. Plaintiff Earls was selected for random drug testing in early 1999. She learned of her selection while attending choir class, which meets in the middle school auditorium. A principal's assistant arrived at the choir class and announced

for all to hear that Ms. Earls needed to report to the school cafeteria. The other students in the class immediately understood that Ms. Earls had been selected for drug testing. One of the students who had previously been drug tested offered to give Ms. Earls a ride back to the high school and to lend "moral support" while Ms. Earls waited for the drug test. In the school cafeteria, the principal explained to the group of approximately fifteen students the procedure to be followed. Each student was given a small cup. Faculty members led the students to the bathroom in groups of three or four. When the time arrived for Ms. Earls to walk to the bathroom, she felt that the entire program was a futile and somewhat humorous waste of time and money. But when she had to produce a urine sample, her sense of amusement turned into embarrassment. She entered a bathroom stall, while three faculty members waited immediately outside the stall listening for the sound of Ms. Earls' urination. One of the faculty members, a sponsor for the cheerleading squad, joked that she felt like she was engaging in "potty training." Another monitor, the sponsor for the softball team, collected Ms. Earls cup, sealed it, and supervised Ms. Earls as she signed her initials on the cup label. Ms. Earls heard nothing further from school officials concerning the results of her drug test, thus indicating that she had "passed" the test.

28. Plaintiff Daniel James seeks to participate in the school's Academic Team, Life Guides and Youth Alive during the 1999-2000 school year. He will be permitted to serve as a Life Guide (a group of role models and peer counselors which requires a pledge of drug and alcohol abstinence but does not require a urine test) and to participate in Youth Alive activities, but he will be ineligible to join the Academic Team and will be barred from the connected curricular class under the school's Drug Testing Policy unless he submits to the school's program of suspicionless drug testing. During the 1998-99 academic year, Mr. James was

not required to consent to drug testing in order to participate in the Life Sports Class, where he joined members of the school's Power Lifting Team in weight-lifting exercises. He excelled at the sport and competed successfully as an individual in tournaments.

29. Mr. James objects to suspicionless drug testing because he believes it interferes with his rights and his privacy. In particular, he fears that an erroneous test result, purporting to show drug or alcohol use, will result in profoundly negative consequences. He believes he would be excluded from Life Guides, would lose his hard-earned reputation as a student leader, and would forfeit any ability to guide his fellow students. His training as a Life Guide included a week-long course and intensive work with professional counselors—all of which would be meaningless if he was perceived to be a drug user. Mr. James believes that his participation in the Academic Team and Life Guides are both of great importance to his ability to gain admission to a competitive university.

B. *The Effects of the Drug Testing Policy*

30. Most, if not all, of the non-athletic activities subject to drug testing are not "extra-curricular" in the normal sense of that word, since each of these activities also includes a classroom component. Students who participate in the Academic Team, Choir, Band, Future Farmers of America (FFA), and Future Homemakers of America (FHA) (and perhaps members of the cheerleading and pom pon squads) must also enroll in a regular class corresponding to each of these activities. Students receive graded credits for these classes only if they participate in the related student activity. Some of these classes are used by students to fulfill the course distribution prerequisites for graduation. For instance, the school requires students to earn fine arts credits in order to receive a diploma. This prerequisite can be met only

through courses associated with a non-athletic student activity, such as choir or band, or through a class devoid of musical performance (for instance, ceramics or music appreciation class). Thus, a student who refuses to submit to random drug testing is excluded from the entire fine arts performance curriculum, forced instead to take a class that teaches only visual arts or music theory.

31. The purpose of defendants' policy is more symbolic than practical. Defendants enacted the Drug Testing Policy, not upon evidence it would have any appreciable effect in reducing use of prohibited substances and not in response to a documented drug problem, but rather because defendants perceived a need to send a message to students and parents that defendants do not condone drug use. Defendants have no reason to believe that students engaged in non-athletic activities are particularly likely to use drugs—indeed, these students are among the least likely to use drugs. Instead of formulating a policy to meet the particularized needs of a proven problem, defendants reacted to the vocal urgings of a small number of parents who believed the school district should to take stronger steps to penalize drug and alcohol use.

32. Defendants arrived at their choice of random drug testing without reaching a considered conclusion that other, less intrusive programs could achieve their stated goals. Although many school districts have found that a drug testing program based on individualized suspicion is adequate to detect and prevent drug use, defendants did not consider such an option or conclude that such an option would be unworkable. Further, defendants had no basis for rejecting the conclusion of many other school districts that random drug testing, if conducted at all, should be limited to athletes, for whom there is a lower expectation of privacy and for whom drug or alcohol use poses special dangers while engaged in strenuous physical activities.

33. The Drug Testing Policy purports to apply to every student in grades 7-12 who "represents Tecumseh schools in any extra-curricular activity such as FFA, FHA, Academic Team, Band, Vocal, Pom Pon, Cheerleader and Athletics." In fact, the Policy applies only to the athletic teams and to the following non-athletic activities enumerated in the Policy, none of which involve communal undressing, other voluntary reductions in student privacy, or risk of physical injury to students:

a. *Academic Team*: The Academic Team consists of a group of students who enroll in a regular academic class and then compete in interscholastic contests. These contests take the form of "quiz bowls" or question-answer sessions on a variety of topics. Students participate in a daily classroom session where they create a notebook project, research and write reports, and undertake other activities designed to broaden the students' knowledge base. Students receive graded credits for their classroom activities. Students also meet once a week after school for practice and compete one to two times per week in tournaments for most of the academic year. In addition to competing at other high schools, the group hosts an annual tournament held at Tecumseh High School.

b. *Band*: Tecumseh High School sponsors both a marching band (which includes a musical section and a color guard) and a concert band. The marching band regularly performs, both on and off campus, at sporting events and competitions. To be eligible to march in the band, students must enroll in the marching band's classroom component, which counts toward a student's graduation requirements; students who do not march in the band are not eligible for the class. The concert band, unlike the marching band, focuses solely on musical performance. Students in the concert band are required

to take a graded classroom component which counts toward their graduation requirements.

c. *Choir*: The school choir performs regular concerts and participates in interscholastic competitions. Apart from the drug testing requirement, it is open to all students who are interested. Those students who choose to participate must be enrolled in a classroom component which counts toward the fine arts distributional requirement, and students who do not perform with the choir are not eligible for the class. Some of the students in the choir also participate in a group known as the Show Choir. More selective than the Choir, the Show Choir requires participants to audition for performance roles, with selection based on their talent and dedication. Subject to the same participatory requirements as the choir, all students in the Show Choir must undergo drug testing and must satisfy the classroom component. The group practices regularly during and after school, and it typically performs in three annual shows, where students sing selections from Broadway musicals. Newspaper announcements and bulletins invite members of the public to the shows, some of which are held in the auditorium of the Tecumseh Middle School.

d. *Future Homemakers of America (FHA)*: Future Homemakers of America is a national club teaching homemaking skills. Participants in the Tecumseh High School's chapter meet regularly during school hours.

e. *Future Farmers of America (FFA)*: Future Farmers of America, a national organization with chapters in many communities, consists of students with an interest in a farming career. Students must enroll in an FFA class in order to be a member of the organization. Participants have the option of entering farming or livestock shows and competitions. All student participants are subject to

the Drug Testing Policy, even when they choose not to enter off-campus shows and instead take only the classroom component of FFA.

f. *Cheerleaders and Pom Pon*: Members of the cheerleading and pom pon squads perform at school athletic events.

34. The choice of activities subject to drug testing has no rational basis. The drug-tested activities have no common factor that is not also shared by other activities not subject to drug testing. These other activities include travel off-campus, representation of the school at interscholastic competitions, activities linked to curricular classes, activities that meet during regular school hours, and activities that meet after school. The Drug Testing Policy does not, for instance, apply to a number of non-athletic student activities, including the following:

a. *Life Guides*: Life Guides are a group of selected students who act as role models for children in the Tecumseh community and serve as peer counselors for students in Tecumseh public schools. They provide a watchful eye and positive encouragement to other students. Although not subject to the Drug Testing Policy, its participants must make a formal pledge to refrain from using drugs and alcohol. The group meets regularly on and off campus, both during and after school hours. As representatives of Tecumseh High School, their activities include: counseling middle school students about drug use, violence, and other issues and performing public skits and role-playing exercises emphasizing positive youth behavior.

b. *School Newspaper*: The school newspaper, "THS Legacy," is written and produced by a group of student reporters and editors. Students who participate must be enrolled in a classroom component, which includes

instruction in journalism and counts toward graduation requirements. Newspaper staff members work during and after school hours, and they sometimes leave the campus in order to report for the paper. Besides publishing the newspaper, the student participants represent the school in interscholastic newspaper competitions.

c. *Yearbook*: Student production of the school's yearbook includes a classroom component with graded credits toward graduation. Students devote some after-school hours to yearbook projects, but most work takes place during school hours. Participants often represent the school at workshops and fund-raising activities.

d. *School Play*: Tecumseh High School produces an annual school play, with auditions open to all students, but since the play is traditionally a musical, casting decisions turn on students' musical abilities. Joining the play does not involve a classroom component, students receive no credits, and rehearsals take place in the afternoons, evenings and on weekends. Apart from the absence of a classroom component, the school musical is indistinguishable from choir activities. As with the Show Choir, students represent the school in a series of performances in the Middle School auditorium to which the public is invited.

e. *Leadership*: Leadership is a service-oriented activity which contains a graded classroom component counting toward a student's graduation requirement. Participants complete some of the work on campus during regular school hours, but spend most of their time representing the school in the community both during and after school hours. Past activities include collecting toys for underprivileged children at Christmas, soliciting contributions for tornado victims, and reading to children at local elementary schools. Participants in

Leadership receive awards for devoting significant amounts of time toward these off-campus activities.

f. *Student Government*: Student government consists of student representatives elected by their classmates. The group meets during regular school hours. The activity requires students to leave campus for fund-raising and other functions.

g. *Beta Club*: The Beta Club is a service-oriented activity which selects participants based on their academic performance. Students meet regularly during school hours and sponsor a variety of service initiatives in the community. Some activities, such a canned food drive and a blood drive, take place at the Tecumseh High School campus. Participants also represent the school during overnight trips to a statewide Beta convention held in Oklahoma City and to a national convention held outside Oklahoma.

h. *Students Against Drunk Driving (SADD)*: Students Against Drunk Driving is a national organization with the purpose of discouraging students from driving under the influence of alcohol. Tecumseh High School's chapter meets regularly during school hours.

i. *French Club*: The French Club requires students to have taken at least one class in French in order to participate. Students who participate meet on campus during school hours. At least once per year, the group attends an off-campus cultural events such as a play or movie.

j. *Spanish Club*: Like the French Club, the Spanish Club requires students to have taken at least one class in Spanish in order to participate. Students meet on campus during school hours. At least once per year, the group attends an off-campus cultural event such as a play or movie.

k. *National Honor Society*: The National Honor Society selects high-achieving students based on their high school grade point average. The chapter at Tecumseh High School holds an annual induction ceremony for new members and meets once a year to elect the chapter's officers.

l. *Math Club*: The Math Club was not active during the 1998-99 school year, but in previous years it met during regular school hours. In addition, the Club sponsored trips to Six Flags amusement park and to a Colorado ski resort. Students also represented the Club at Oklahoma University football games.

m. *Fellowship of Christian Athletes (FCA)*: FCA, a group of Christian student athletes, meets weekly after school hours. Meetings include inspirational speakers and fellowship.

n. *Youth Alive*: Youth Alive meets during school hours for weekly prayer meetings.

o. *Eco Club*: Eco Club, a student environmental organization, meets regularly during school hours and sponsors several projects dedicated to environmental protection, such as Earth Week and flower-planting.

35. In addition to formalized student activities, students represent the school in a variety of field trips associated with academic classes. For instance, Plaintiff Earls joined her sociology class in a visit to a state prison in Lexington, Oklahoma. On May 11, 1999, the students toured the prison and talked with a warden and several inmates. The prisoners and prison officials were informed that the students were enrolled at Tecumseh High School. Ms. Earls' parents signed a permission slip stating the time, place and sponsors of the field trip, but Ms. Earls and her parents were not required to consent to her being drug tested as a condition of joining in the prison visit.

E. *Unreliability of Defendants' Drug-Testing Methodology.*

36. Immunoassay urine tests are subject to several sources of error. The most common disadvantage associated with the test is the production of "false positives" (incorrectly detecting the presence of chemical metabolites, or residues, where none are present). This can occur due to the nature of the technology, which relies on the detection of color changes in the urine after reaction to drug metabolites. When chemicals permitted by the school district create color changes similar to the change created by metabolites of prohibited substances, some individuals tested may be incorrectly identified as drug users. Examples of such chemicals are ibuprofen, which can react as a false positive for marijuana, and the metabolites of poppy seeds, which can react as a false positive for narcotics.

37. The immunoassay urine test is also capable of producing "false negatives," failing to identify with positive results those students who have actually used the prohibited substances. This can occur when chemical masking agents are used to minimize the chance of detection or when timing of the test prohibits detection. The urine test is only effective as long as the substances it is attempting to detect have been metabolized and the metabolites have reached and remain in the urine. They cannot be detected after the metabolites have all been excreted from the body. Because alcohol and its metabolites pass quickly through the human body, the test will detect alcohol use only if performed within less than 24 hours after consumption. The window of detection for cocaine, heroin and methamphetamines are only slightly longer. Of the drugs typically used by high school students, a random drug test is likely to detect only marijuana or tobacco—and the school's Policy does not call for testing of tobacco. The test for detection of performance enhancing drugs like steroids costs approximately $200, making it unfeasible for most schools to test for these substances.

38. If properly used, GC/MS methodology helps minimize the likelihood of false positives, since it is better able to distinguish between a prohibited substance and a substance that is chemically similar to the prohibited substance. However, not all laboratories equipped with GC/MC equipment are qualified to use this technology to detect drug or alcohol metabolites. The Policy does not requires that the laboratory employed by defendant is certified by the federal government, the Oklahoma State Department of Health, or any other authority for use of GC/MS technology in drug or alcohol testing. The Policy does not set appropriate protocols for sample collection, documentation, and preservation of chain of custody—all of which are necessary for accurate test results. Moreover, since GC/MS methodology is used only after a positive immunoassay test, it will not affect the rate of false negatives, i.e., the testing program will be incapable of detecting a significant range of uses of prohibited substances.

V.

CLAIMS FOR RELIEF
FIRST CAUSE OF ACTION

39. Plaintiffs reallege and incorporate by reference ¶¶ 1 through 38 as if set forth fully herein.

40. The Fourth Amendment to the U.S. Constitution provides in relevant part: "The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

41. Defendants' enactment and implementation of the portion of the Student Activities Drug Testing Policy requiring suspicionless testing of students engaged in non-athletic activities violates the Fourth Amendment, as incorporated and made applicable to Defendants by the Fourteenth Amendment, facially and as applied to plaintiffs.

VI.

IRREPARABLE HARM

42. Plaintiffs have suffered and will continue to suffer irreparable harm due to their exclusion from academic classes and student activities unless they submit to suspicionless drug testing. Class credits are necessary for graduation, and associated student activities play a vital role in college admissions, social involvement, and skills development.

43. Plaintiffs have a constitutional right to be free of suspicionless testing of their urine for the presence of prohibited substances. The denial of plaintiffs' constitutional rights constitutes per se irreparable harm.

VII.

PRAYER FOR RELIEF

WHEREFORE,

Plaintiffs accordingly pray for the following relief:

A. A preliminary and permanent injunction enjoining defendants, their agents, employees, assigns, and all persons acting in concert or participating with them from (1) enforcing the provisions of the Student Activities Drug Testing Policy requiring suspicionless testing of students engaged in non-athletic activities, or (2) taking any other measure to subject plaintiffs or other students seeking to participate in non-athletic student activities to tests for detection of prohibited substances except upon individualized, reasonable suspicion that a particular student has consumed a prohibited substance.

B. A declaration pursuant to 28 U.S.C. §§ 2201 and 2202 that the provisions of the Student Activities Drug Testing Policy requiring suspicionless testing of students engaged in non-athletic activities violates plaintiffs' rights under the Fourth and Fourteenth Amendments to the United States Constitution facially and as applied to plaintiffs.

C. Allow Plaintiff's their reasonable attorneys' fees and costs pursuant to 42 U.S.C. §1988; and

D. Such other and further relief as this court may deem necessary and proper.

Dated: August 18, 1999

Respectfully submitted,

GRAHAM A. BOYD
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Drug Policy Litigation Project

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ANSWER OF DEFENDANTS
Filed August 24, 1999
[Caption Omitted in Printing]

COME NOW the purported Defendant, Board of Education of Tecumseh Public School District, Independent School District No. 92 of Pottawatomie County and the Defendant, Independent School District No. 92 of Pottawatomie County, Oklahoma (designated in the style as "Tecumseh Public School District, Independent School District No. 92 of Pottawatomie County"), and for answer to the Complaint of the Plaintiffs herein allege and state as follows:

1. The Defendants deny, generally and specifically, each allegation of the Plaintiffs except those which are hereinafter specifically admitted.

2. With respect to Paragraph No. 1, Defendants admit that Plaintiffs are seeking declaratory relief, as stated. Defendants deny Plaintiffs are entitled to the declaration they seek. Defendants further admit Plaintiffs are seeking injunctive relief, but deny they are entitled to such relief. Defendants specifically deny that any form of punishment whatsoever is involved in this action. Defendants admit children in the State of Oklahoma under the age of 21 years old are entitled to a free, public education within the State of Oklahoma, but specifically deny that their right to a free, public education is in any way infringed by Defendants' drug-testing policy. Defendants specifically deny that Plaintiff Daniel James is entitled to an education at Defendant Independent School District No. 92 of Pottawatomie County, Oklahoma, since he is not a resident of the district.

3. With respect to Paragraph No. 2, it is admitted that students at Tecumseh High School have, for many years, been offered the opportunity to participate in school-sponsored extra-curricular and co-curricular endeavors. It is denied that there are "roughly 1,000 students at Tecumseh

High School." It is admitted that a majority of Tecumseh High School students participate in at least one extra-curricular club or activity. It is further admitted that Defendants believe students benefit from participating in these voluntary extra-curricular clubs and activities. It is further admitted that extra-curricular clubs and activities have been and are currently open to any students who meet the requirements to participate in the activity. The remaining allegations of Plaintiffs' Paragraph No. 2 are denied.

4. With respect to Paragraph No. 3 of Plaintiffs' Complaint, it is admitted that in October, 1998, Defendants' implemented a student activities drug-testing policy. That policy does require students who participate in certain enumerated extra-curricular activities to submit to drug testing as set forth in the policy. It is further admitted that students are asked to pay an annual $5.00 fee to help defray the costs of this drug testing. It is further admitted that the policy applies to extra-curricular athletic activities as well as enumerated competitive non-athletic student extra-curricular activities. It is specifically denied that the drug-testing policy applies with respect to any academic, non-extra-curricular, classes or activities. It is specifically denied that a student may only take the academic choir class only if she participates in the extra-curricular choir activities. It is admitted that any student who refuses to participate in the drug-testing policy will not be allowed to participate in the voluntary, extra-curricular activities enumerated. It is specifically denied that students who are unable to pay the $5.00 fee will be denied the opportunity to participate in the voluntary extra-curricular activities. It is specifically denied that students will be ejected from any regular classes if the student refuses to agree to the drug-testing policy for extra-curricular activities. The remaining allegations of Plaintiffs' Complaint, Paragraph No. 3 are denied.

5. The allegations of Plaintiffs' Complaint, Paragraph No. 4 are denied.

6. The allegations of Plaintiffs' Complaint, Paragraph Nos. 5 through 10, inclusive, are admitted.

7. With respect to Plaintiffs' Complaint, Paragraph No. 11, it is admitted that Tecumseh Public School District offers student activities that complement the standard academic curriculum. Students are able to participate in activities, including marching band and the French Club, depending upon their interest and abilities. It is denied that some of these activities contain a classroom component. The classroom component is entirely separate and apart from the extra-curricular activity. However, it is admitted that certain extra-curricular activities are only open to participation to students who are enrolled in, or have previously taken, certain academic courses. Those academic courses may have been either required or included within the credits necessary in order to graduate.

8. With respect to Plaintiffs' Complaint, Paragraph No. 12, it is admitted that the requirements at Tecumseh High School for participating in student extra-curricular activities depend on the activity involved and the requirements therefore. It is further admitted that participants in athletics are and have been required to meet certain health requirements and pass a physical exam. It is further admitted that no physical or medical exam was required for participation in non-athletic extra-curricular activities, such as academic team and choir competition. The remaining allegations of Paragraph No. 12 are denied.

9. The allegations of Plaintiffs' Complaint, Paragraph No. 13 are denied. Defendants further state that even if is shown that Tecumseh High School students do not diverge from national trends on drug usage, any drug usage among its students is unacceptable and contrary to the best interests and safety of the students.

10. With respect to Plaintiffs' Complaint, Paragraph Nos. 14 and 15, Defendants admit that the two events generally referred to did occur, and caused concern among the constituents of the District, as well as the Defendants. However, it is denied that these instances were the sole motivation for enactment of the student activities drug-testing policy.

11. With respect to Plaintiffs' Complaint, Paragraph No. 16, it is admitted that the quoted language is contained within the drug-testing policy.

12. With respect to Plaintiffs' Complaint, Paragraph No. 17, it is admitted that each student participating in a covered extra-curricular activity is asked to pay an annual fixed sum to partially cover the costs of his or her initial drug test and subsequent random drug testing. It is further admitted that for the 1998-1999 academic year the sum was $4.00, and for the 1999-2000 the sum is $5.00. It is specifically denied that students who are unable to pay the $5.00 testing fee are ineligible to participate in student extra-curricular activities covered by the drug-testing policy. It is specifically denied that students who refuse to participate in the drug-testing policy are ineligible to enroll in and take academic courses associated with any extra-curricular activity. It is admitted that students who refuse to comply with the drug-testing policy are not eligible to participate in the enumerated extra-curricular activities.

13. The allegations of Plaintiffs' Complaint, Paragraph No. 18, are admitted.

14. With respect to Plaintiffs' Complaint, Paragraph No. 19, it is denied that the initial screening applies differently to athletic and non-athletic activities. It is admitted that there has never been a requirement for physical examination for band or academic team. It is further admitted that an initial urine test was not required for students during the year when

the policy first went into effect, since the policy went into effect after the student activities had already begun. It is admitted that students have been told that all students participating in extra-curricular activities subject to the policy will be required to submit urine samples at the beginning of the 1999-2000 school year.

15. The allegations of Plaintiffs' Complaint, Paragraph Nos. 20 through 24, are admitted.

16. With respect to Plaintiffs' Complaint, Paragraph No. 25, it is admitted that Plaintiff Lindsay Earls has previously participated in the school's academic team, choir, show choir, marching band, Beta Club, and National Honor Society. Upon information and belief, it is admitted Ms. Earls' desires to continue participating in these activities and she has enrolled in academics class, choir, and band during the 1999-2000 school year. It is admitted that even if she does not participate in the drug-testing policy, she will be permitted to continue as a member of the Beta Club and National Honor Society. It is further admitted that if she refuses to participate in the drug-testing policy, she will not be allowed to participate in the extra-curricular activities of academic team competition, choir competition, and band competition during the 1999-2000 school year. It is specifically denied that Plaintiff Lindsay Earls will be expelled from any curricular classes under the school's drug-testing policy. These Defendants do not know what "Ms. Earls' plans" with respect to choir and band class credits may be, and therefore those allegations are deemed denied. It is admitted that choir and band may be used to meet the school's graduation requirements of fine arts classes. It is denied that Ms. Earls needs to meet further requirements to meet the fine arts graduation requirement, because she has already met that requirement. These Defendants are without sufficient information to form a belief as to the accuracy of Plaintiff Lindsay Earls' considerations and "fears" for a college major, plans to apply for

scholarships, and future plans and aspirations and therefore those allegations are deemed denied. It is specifically denied that Plaintiff's failure or refusal to comply with the drug-testing policy would foreclose Ms. Earls from any curricular classes. It is denied that Defendants' drug-testing policy would, in any manner, foreclose Plaintiff Lindsay Earls' ability to major in music in college or receive music scholarships. It is admitted that she has met the requirements for enrollment in her chosen classes, and has met the requirements to participate in the extra-curricular activities associated with band and choir, including consenting to the drug testing policy. It is specifically denied that Plaintiff Lindsay Earls would have been barred from any "associated classes" if she had refused to consent to the school's drug-testing program.

17. With respect to Plaintiffs' Complaint, Paragraph No. 26, it is specifically denied Plaintiff Lindsay Earls has been coerced in any manner. These Defendants are not able to discern Plaintiff Lindsay Earls' thought processes, and therefore, these Defendants do not know what motivated Ms. Earls to consent to the drug-testing policy in the 1998-1999 school year. Neither Ms. Earls, nor her parents, at any time voiced any complaint or wrote any caveat or exception to their consents. The remaining allegations of Plaintiffs' Complaint, Paragraph No. 26, are admitted.

18. With respect to Plaintiffs' Complaint, Paragraph No. 27, it is admitted that Lindsay Earls was randomly selected for drug testing in January of 1999. It is further admitted that the drug test did not indicate any drug usage. At this time, Defendants are without sufficient information to form a belief as to the accuracy of the remaining allegations of Plaintiffs' Complaint, Paragraph No. 27, and therefore they are deemed denied.

19. With respect to Plaintiffs' Complaint, Paragraph No. 28, it is admitted that Plaintiff Daniel James is enrolled in

academics class, and that he may seek to participate in Academic Team. It is denied that he is currently eligible to participate in the competitive Academic Team based upon his grades. It is further admitted that Plaintiff Daniel James participates in Life Guides and Youth Alive; however, it is specifically denied that Life Guides and Youth Alive are extra-curricular activities sponsored by the Defendants. It is admitted that Life Guides and Youth Alive are allowed the opportunity to meet at the school, during non-instructional time. It is admitted that Plaintiff Daniel James may serve as a Life Guide and may participate in Youth Alive activities; however, it is denied that these Defendants sponsor, regulate, or control participation requirements for those activities, since they are not school-sponsored extra-curricular activities. It is further specifically denied that Plaintiff Daniel James will be barred from taking any curricular class under the drug-testing policy unless he agrees to submit to the school's program of drug testing. It is further admitted that during the 1998-1999 academic year, Plaintiff Daniel James was not required to consent to drug testing in order to participate in the curricular gym Life Sports Class, since there is no requirement for any student to consent to the drug-testing policy to participate in any curricular class. It is admitted that during Life Sports Class he participated in classroom instruction in weight-lifting exercises. These Defendants are without information to form a belief as to the accuracy as to whether or not Mr. James "excelled" at power lifting and whether or not he competed successfully as an individual in tournaments, and therefore denies same.

20. These Defendants are not able to discern Plaintiff Daniel James' thought processes and therefore these Defendants do not have sufficient information to form a belief as to the accuracy of Plaintiffs' Complaint, Paragraph No. 29, and therefore the allegations are deemed denied.

21. With respect to Plaintiffs' Complaint, Paragraph No. 30, it is denied that the non-athletic activities subject to drug testing are "not 'extra-curricular' in the normal sense of that word." It is denied that any activities include a classroom component. It is admitted that in order to participate in certain extra-curricular activities, there is a requirement that a student either currently be enrolled in, or have previously taken, certain classes. It is admitted that students who participate in the Academic Team must be enrolled in Academics class. It is admitted that students who participate in extra-curricular choir activities must be enrolled in choir. It is admitted that students who participate in extra-curricular band activities must be enrolled in band class. It is admitted that students who participate in Future Farmers of America (FFA) extra-curricular activities must be currently enrolled in agricultural classes. It is admitted that students who participate in Future Homemakers of America (FHA) must currently be enrolled in or have previously been enrolled in a family and consumer science class. It is specifically denied that students only receive graded credits for the curricular classes if they participate in the related student extra-curricular activities. It is admitted that students at Tecumseh High School are required to earn one fine arts credit in order to graduate. It is specifically denied that a student who refuses to submit to random drug testing is excluded from any of the fine arts performance curricular classes.

22. The allegations of Plaintiffs' Complaint, Paragraph Nos. 31 and 32, are denied.

23. With respect to Plaintiffs' Complaint, Paragraph No. 33, it is admitted that the policy applies to every student in grades 7 through 12 who represents Tecumseh Schools in competition with respect to FFA, FHA, academic team, band, vocal, pom-pon, cheerleader, and athletics. It is denied that

those groups do not involve voluntary reductions in student privacy, and risk of physical injury or drug abuse by students.

24. The allegations of Plaintiff's Complaint, Paragraph No. 33(a), are admitted.

The allegations of Plaintiff's Complaint, Paragraph No. 33(b), are admitted, except that it is specifically denied that students who do not march in the band in competitive extra-curricular activities are not eligible for the band class, and it is also denied that students who do not participate in the extra-curricular concert band competitions are unable to enroll in the band class.

25. With respect to Plaintiff's Complaint, Paragraph No. 33(c), it is specifically denied that students must participate in the extra-curricular choir competitions if they are enrolled in choir class. The remaining allegations of Paragraph No. 33(c), are admitted.

26. The allegations of Plaintiff's Complaint, Paragraph No. 33(d), are admitted.

27. The allegations of Plaintiff's Complaint, Paragraph No. 33(e), are admitted, except that it is specifically denied that students who choose not to enter off-campus extra-curricular shows, and instead take only the classroom agricultural-related classes, are required to participate in the drug-testing policy.

28. The allegations of Plaintiff's Complaint, Paragraph No. 33(f), are admitted.

29. With respect to Plaintiff's Complaint, Paragraph No. 34, it is specifically denied that the choice of activities subject to drug-testing has no rational basis and that the activities do not share a common factor that is not shared by other activities which are not subject to drug testing.

30. With respect to Plaintiff's Complaint, Paragraph No. 34(a), since Life Guides is not a school-sponsored extra-curricular activity, these Defendants are without sufficient information to form a belief as to the accuracy of the allegations concerning the requirements for participation and their activities and therefore the allegations are deemed denied. It is admitted that the group is allowed to meet on campus. It is denied that the group is allowed to meet during classroom instructional hours.

31. The allegations of Plaintiff's Complaint, Paragraph Nos. 34(b) and 34(c), are admitted.

32. With respect to Plaintiff's Complaint, Paragraph No. 34(d), it is admitted that Tecumseh High School produces an annual school play, with auditions open to all students, and that the play is frequently a musical play and casting considerations include students' musical abilities. It is admitted that participation in the play does not involve a classroom component, and the students receive no credits for participation in the play and that rehearsals take place outside of regular school hours. It is denied that the school play is indistinguishable from choir activities. It is admitted that students perform the play in the auditorium, and the public is invited.

33. With respect to Plaintiff's Complaint, Paragraph No. 34(e), it is denied that Leadership is an extra-curricular activity. The remaining allegations of Paragraph No. 34(e) are admitted.

34. With respect to Plaintiff's Complaint, Paragraph No. 34(f), it is denied that student government activities require students to leave campus for any reason. The remaining allegations of Paragraph No. 34(f) are admitted.

35. The allegations contained in Plaintiff's Complaint, Paragraph No. 34(g), are admitted.

36. With respect to Plaintiff's Complaint, Paragraph No. 34(h), it is denied that Students Against Drunk Driving (SADD) meets regularly during school hours. The remaining allegations of 34(h) are admitted.

37. The allegations of Plaintiff's Complaint, Paragraph Nos. 34(i) through 34(m), are admitted.

38. The allegations of Plaintiff's Complaint, Paragraph No. 34(n), are denied.

39. The allegations of Plaintiff's Complaint, Paragraph No. 34(o), are admitted.

40. The allegations of Plaintiff's Complaint, Paragraph No. 35, are admitted.

41. With respect to the allegations of Plaintiff's Complaint, Paragraph Nos. 36 through 38, these Defendants are without specific information to admit the particular statements made by Plaintiffs, and therefore they are deemed denied. It is admitted that the immunoassay urine tests are not sufficiently reliable, in and of themselves, to form a definitive belief that students have taken illegal drugs. It is for that reason that the gc/ms methodology is used in the event the immunoassay test indicates and detects presence of chemical metabolites. It is further for that reason that Defendants utilize a drug-testing laboratory that has expertise and proper credentials and is used by other school districts throughout the State of Oklahoma for drug testing.

42. With respect to Plaintiff's Complaint, Paragraph No. 39, these Defendants re-allege and incorporate by reference their specific answers and responses to Plaintiffs' Complaint, Paragraph Nos. 1 through 38, of as if fully set forth herein for response.

43. The allegations of Plaintiff's Complaint, Paragraph No. 40, are admitted.

44. The allegations of Plaintiff's Complaint, Paragraphs No. 41, 42 and 43, are denied.

AFFIRMATIVE DEFENSES

For further, affirmative defense, Defendants, and each of them allege and state as follows:

1. Plaintiffs' Complaint fails to state a claim upon which relief may be granted.

2. The purported Defendant, Board of Education of Tecumseh Public School District, Independent School District No. 92 of Pottawatomie County, lacks capacity to be sued.

3. Plaintiff Daniel James lacks standing to maintain this action.

4. Plaintiff Lindsay Earls has affirmatively and specifically waived any objections to the drug-testing policy herein.

5. Defendants' drug-testing policy, is a rationale, appropriate and considered response to the perceived and actual drug problem among students.

WHEREFORE, having fully answered, the Defendants, Board of Education of Independent School District No. 92 of Pottawatomie County, Oklahoma and Independent School District No. 92 of Pottawatomie County, Oklahoma, pray that the Plaintiffs take nothing by their Complaint herein, and that judgment be rendered for the Defendants and against the Plaintiffs, and that these Defendants be discharged, together with their costs and attorney fees incurred.

Respectfully submitted,

THE CENTER FOR EDUCATION LAW, INC.

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[Certificate of Service Omitted in Printing]

DEFENDANTS' RESPONSES TO PLAINTIFFS' INTERROGATORIES, FIRST SET

Mailed to Plaintiff's Attorney on December 17, 1999
[Caption Omitted in Printing]

INTERROGATORY NO. 1: State the number of Tecumseh students who were drug tested by Defendants in the 1998-1999 school year and the 1999-2000 school year, the number who tested positive, the substance that was identified in each positive test, and the competitive extracurricular activity or activities in which the student engaged causing him or her to be subject to the Drug Testing Policy.

RESPONSE TO INTERROGATORY NO. 1: The number of students drug tested in the 1998-1999 school year was 239. The number of students drug tested in the 1999-2000 school year was 266. The number of students who tested positive and the substance that was identified in each positive test was previously supplied to you in document form pursuant to your first request for production of documents transmitted to this firm on September 13, 1999. The competitive activities in

which the student engaged causing them to be subject to the Drug Testing Policy are produced in the packet entitled "Response to Interrogatory No. 1 in Response to Request for Production of Documents, Second Set, No. 3."

INTERROGATORY NO. 2: State the number of Tecumseh students, broken down by school, who participated in each non-athletic activity covered by the Drug Testing Policy for the 1998-1999 and 1999-2000 school years.

RESPONSE TO INTERROGATORY NO. 2:

FOR THE 1998-1999 SCHOOL YEAR

Middle School

Band	56
FFA	30
Vocal Music	46

High School

FFA	208
FHA	119
Band	70
Academic Team	14
Vocal Music	75

FOR THE 1999-2000 SCHOOL YEAR
(first term only)

Middle School

Band	52
FFA	29
Vocal Music	44

High School

FFA	100
FHA	63
Band	67
Academic Team	16
Vocal Music	65

INTERROGATORY NO. 3: State any extracurricular activities participated in by any Tecumseh student who has been caught with drugs or disciplined for drugs in the last four years and whether that student was actively involved in the activity at the time of the incident.

RESPONSE TO INTERROGATORY NO. 3: Objection. This interrogatory seeks information which is burdensome and impossible to provide a response because the District does not maintain any records that can be cross referenced for the last four years identifying students "who has been caught with drugs" or "disciplined for drugs" and if that student was "actively" involved in any extracurricular activity at the time. Without waiving any objection, in the middle school in the last four years, Don Warden, the Principal of the middle school, can testify that students enrolled in Athletics, FFA, Vocal, and Band have been caught with drugs or disciplined for drugs over the last four years. At the high school, James Blue, the Principal of the High School, can testify that students enrolled in FFA, FHA and Athletics have been caught with drugs or disciplined for drugs over the last four years.

INTERROGATORY NO. 4: Of the "Student Activity Offerings" ("Organizations" and "Activities") listed on page 36 of the Tecumseh High School 1999-2000 Academic Planning Guide, identify every student organization or student activity which involved student overnight travel during the past five years.

RESPONSE TO INTERROGATORY NO. 4: During the past five years, the following organizations have involved overnight travel:

Student Council	Mu Alpha Theta
Beta Club	FFA
Band	Choir
Wrestling	Baseball
Academic	TeamCheerleading
Pon Poms	

INTERROGATORY NO. 5: For each organization or activity identified in response to the previous interrogatory, state whether students were required to meet O.S.S.A.A. eligibility rules in order to join the organization or activity and whether students were required to, and in fact did, meet O.S.S.A.A. eligibility rules in order to participate in the overnight travel of the organization or activity.

RESPONSE TO INTERROGATORY NO. 5: No students were required to meet O.S.S.A.A. eligibility rules in order to join the organizations which engaged in overnight travel over the past five years. Students belonging to Mu Alpha Theta participating in overnight travel were not required to meet any O.S.S.A.A. eligibility rules. Therefore, Defendants cannot determine whether or not, those students "in fact did, meet O.S.S.A.A. eligibility rules." Students belonging to Student Council, Beta Club and some students belonging to FFA participating in overnight travel were required to meet some O.S.S.A.A. eligibility rules. Students participating in overnight travel in Wrestling, Baseball, Cheerleading and Pon Poms were required to meet all eligibility rules of the O.S.S.A.A., and students in Band, Choir and some students involved in FFA participating in overnight travel were required to meet only those eligibility rules of the O.S.S.A.A. relating to non-athletic activities.

INTERROGATORY NO. 6: Identify every occasion of which Defendant is aware in which any Tecumseh student or any other student of an Oklahoma public school has been made ineligible for competition under the portion of O.S.S.A.A. Rule 4, Section 1(a), which states that a student may be deemed ineligible if the student's "conduct or character outside the school is such as to reflect discredit upon the school." For any such occasion, state the dates, reasons and circumstances for the student's ineligibility.

RESPONSE TO INTERROGATORY NO. 6: Objection. This interrogatory seeks information which is burdensome as phrased. The definition of "Defendant" encompasses every employee of the District and Defendant has approximately 260 employees in many different areas of administration, teaching and support personnel. Further, this interrogatory seeks information concerning all students engaged in competition in the State of Oklahoma during an indefinite period, which information, if kept, would be kept by and be within the knowledge of the Oklahoma Secondary School Activities Association which came into existence in 1911. Without waiving this objection, the Defendant is not "aware" of any student in Tecumseh or the State of Oklahoma made ineligible for competition under O.S.S.A.A. Rule 4, Section 1(a).

INTERROGATORY NO. 7: State the number of Tecumseh High School students pre-enrolled in each Academic Team class, each Band class, and each Choir class for each term or semester for each of the past five years; the number of students who actually enrolled in each Academic Team class, each Band class, and each Choir class for each term or semester for each of the past five years; and the number of students who completed Academic Team class, each FHA class, each FFA class, each Band class, and each Choir class for each term or semester for each of the past five years.

RESPONSE TO INTERROGATORY NO. 7: Objection. This interrogatory seeks information which is unavailable and/or burdensome as phrased. The District does not maintain its pre-enrollment forms. Furthermore, in order to ascertain the information requested, each grade book for each class must be examined to scrutinize the history of every student. Without waiving this objection, the number of students who actually enrolled in each class and the number of students who completed the class for each year are as follows:

1995-1996 SCHOOL YEAR

Organization	Enrolled	Completed
FFA	227	214
FHA	138	119
Band	64	57
Academic Team	14	13
Vocal Music	(These Records cannot be Found.	62

1996-1997 SCHOOL YEAR

Organization	Enrolled	Completed
FFA	438	406
FHA	111	100
Band	(These records cannot be found.)	
Academic Team	16	16
Vocal Music	102	81

1997-1998 SCHOOL YEAR

Organization	Enrolled	Completed
FFA	258	222
FHA	115	106
Band	75	71
Academic Team	17	16
Vocal Music	(These records cannot be found.)	71

1998-1999 SCHOOL YEAR

Organization	Enrolled	Completed
FFA	208	189
FHA	119	117
Band	70	69
Academic Team	14	13
Vocal Music	75	62

1999-2000 SCHOOL YEAR
(first term only)

Organization	Enrolled	Completed
FFA	93	100
FHA	63	56
Band	60	67
Academic Team	16	16
Vocal Music	50	65

INTERROGATORY NO. 8: If your response to Plaintiffs' Request for Admission No. 3 is anything other than an unqualified admission, state each risk of immediate physical harm from participating in interscholastic competitions of the Choir, Band, FHA, or Academic Team and list every occasion in which a student has suffered such harm as a result of participating in such interscholastic competitions.

RESPONSE TO INTERROGATORY NO. 8: With regard to Choir, the deposition of Carolyn Daugherty and the deposition of Dean Rogers contain the testimony of the dangers of competition. In addition, Carolyn Daugherty will testify that if a student is under the effects of drugs, his/her performance is likely to be affected. The physical safety of the student would be questionable since standing long periods of time for a concert or contest is necessary. Their mental alertness would be hampered—making it harder to work effectively with the rest of the choir in performing as a single unit. Because judgment would be impaired, behavior would be unacceptable as it would be unruly and obnoxious. Their reputation and self worth would be marred making it hard to regain the confidence and motivation to participate in any activity.

With regard to Band, the Band sponsor will testify that during Marching Band the students must be able to maneuver in and around other students in formations rather quickly at times and with great precision; if the student was in an altered state, this could affect timing and cause people to get hurt, fall down, get smashed into, *etc.*, which could also damage expensive instruments.

Color Guard students swinging six-foot poles around in an altered state could seriously hurt somebody or cause damage to instruments.

Band is a very physical activity that takes great precision in extremely hot and extremely cold weather. Participating under these conditions in an altered state could be very hazardous to the student and other participating students.

With regard to FHA, Sheila Evans, the FHA Sponsor will testify that students who compete in STAR events would be leaving school and would not always be constantly under the supervision of a District employee. There could be a health risk because of this.

With regard to Academic Team, Nancy Warwick, the Academic Team Sponsor will testify that a student participating in this activity would need to get to and from the activity itself and possibly transport others to and from the activity, including conference meets which are held in Shawnee. At other times they would be driving to catch a bus. Once at the meet, they must be cognizant of their surroundings by being able to find buildings and rooms on a school's campus. Once in the room, they would have to be able to listen and follow instructions. The ability to react and respond quickly is essential to success. Other students on the team will be relying on each other to perform based on what they have learned in the past and to respond quickly. An impaired student who cannot perform as expected causes discord among the team members. If a student becomes sick because of something they have taken, the coaches would have to leave the activity to provide for the ill student. The student's health would be the first priority, possibly resulting in a forfeit of the contest. If a student misbehaves due to some drug they have taken, this could also result in the team's forfeiting the contest or being kicked out of the contest. One student's health on the team will definitely affect all members.

At this time, Defendant has no knowledge of a student who suffered immediate physical harm as a result of participating in Choir, Band, FHA or Academic Team.

INTERROGATORY NO. 9: If your response to Plaintiffs' Request for Admission No. 5 is anything other than an unqualified admission, state the risks of immediate physical harm that are unique to FFA competitions (*i.e.*, a risk of

immediate physical harm that arises in FFA competitions but does not arise in Agriculture classes or in non-competitive FFA activities) and list every occasion in which a student has suffered a harm that is unique to FFA competitions.

RESPONSE TO INTERROGATORY NO. 9: With regard to FFA, the dangers that arise in competitions that do not arise in non-competitive activities and the occasions of harm are contained in the deposition of Dean Rogers.

Additionally, Danny Sterling, FFA Sponsor, will testify that one of the most popular FFA activities is exhibit livestock. This consists of physically handling beef, swine, and sheep. These animals are trained to respond to various methods of restraining, voice commands, cues from special equipment (halters, show sticks, *etc.*), and the physical "leading" of the animals.

Many of these animals are sometimes very nervous at livestock shows. Especially, if they have not been "shown" very often. Some of the animals are just more nervous than others regardless of how often they have been exhibited. Even the more calm animals can sometimes be frightened unexpectedly and try to flee from the person who is in control of them.

Because of the above factors, it is imperative that whoever is exhibiting the animal be in as much physical control as possible of the animal. When you consider the size and strength of many of these animals coupled with the size and strength of the average human, the probability of a person physically restraining an animal that is trying to flee is very small. Therefore, a person on drugs or in an altered state increases the risk of getting not only themselves injured, but also those in the immediate area.

INTERROGATORY NO. 10: If your response to Plaintiffs' Request for Admission No. 6 is anything other than an unqualified admission, identify all incidents of drug usage by

Tecumseh students of which Defendants have specific evidence and which are not mentioned in Defendants' Statement of Uncontroverted Fact, identify all witnesses with knowledge of such incidents, and identify all documents that refer or relate to such incidents.

RESPONSE TO INTERROGATORY NO. 10: Objection. This interrogatory seeks information which is burdensome as phrased. The definition of "Defendants" encompasses every employee of the District and Defendant has approximately 260 employees in many different areas of administration, teaching and support personnel. Furthermore, the Request for Admission covers an infinite period of time. Without waiving this objection, you were previously provided disciplinary referrals relating to incidents of drug usage in the high school pursuant to Plaintiffs' requests for production transmitted on September 13, 1999. The testimony of James Blue, whom Plaintiffs deposed on October 25, 1999, testified that all instances where the parents were called, the interview with the student, the odor of the student or his appearance indicated evidence of drug usage. The disciplinary referrals indicate the date and the witnesses to each incident. You were also previously provided disciplinary referrals relating to the middle schools.

Other incidents currently known to the District and not mentioned in the Statement of Uncontroverted Facts are also contained in the disciplinary referrals produced in Response to Interrogatory No. 12 herein.

In addition, other incidents currently known are:

1997-1998 School Year

Sixth-grade boy student and counselor discussed his Ritalin medication. The conversation led him to speak about his past drug use when he lived in Arizona with his father.—Witness, Julie Dawson.

The drug dog hit on a seventh-grade boy. There was a drug scent, but no substance was found.—Witness, Julie Dawson.

An eighth-grade boy, a former gang member when he lived in Oklahoma City, confided in the counselor about past drug use.—Witness, Julie Dawson.

An eighth-grade boy was offered a pink pill by a seventh-grade boy at breakfast.—Witness, Julie Dawson.

A seventh-grade boy student had been in serious trouble in class. He confided in his seventh-grade teacher that there is drug use by his father and two high school sisters. He admits he used the drugs in his father's home. His mother also has drug use in her house. The child thinks that it is mostly the boyfriend who smokes "pot." DHS was contacted to help with this issue.—Witness, Julie Dawson.

An eighth-grade girl student that is new to Tecumseh told other eighth-grade girls that she is using "pot." One of the other students informed the counselor.—Witness, Julie Dawson.

Two eighth-grade boys were expelled for selling drugs at school. The counselor does not know what the substance was. The boys they sold it to told the sellers that the counselor saw the transaction and turned them in so that they could get some of the heat off of them. One seller was an athlete. Two of the buyers were band students, eighth grade boys. Earlier in the year the mother of one of these boys asked the counselor's advice about her son's drug problems.—Witness, Julie Dawson.

A sixth-grade girl student (she is in vocal) showed a marijuana joint to another sixth-grade girl. She put it back in her purse. The girl who saw it told the counselor and the Assistant Principal was notified. The girl

claimed it was her aunt's drug and that her mother was aware that her aunt used drugs. The girl claimed that it was not hers and she was not going to smoke it.—Witness, Julie Dawson.

1998-1999 School Year

Two students who tested positive under the Drug Testing Policy at the high school.—Witness, James Blue—documents already provided.

One student who tested positive under the Drug Testing Policy at the middle school—Witness, Don Warden—document already provided.

A band student and a vocal student who confided in a school counselor about their drug use.—Witness, Julie Dawson.

A Tecumseh student who was stopped by police in an automobile in which drugs were found by police.—Witness, Julie Dawson.

A Tecumseh student who after running away from home was found and tested positive for PCP and marijuana.—Witness, Julie Dawson.

A Tecumseh student was found in the home of another student smoking marijuana.—Witness, Kay De Somer.

An eighth-grade girl talked to the counselor about getting in trouble with her mother when her mother found drugs in her room. She is in vocal and athletics. She told her mother they were not hers, but her mother did not trust her.—Witness, Julie Dawson.

A seventh-grade girl that has been in Carter Hall for a while wrote a letter to her friend and addressed it to the counselor to give to her friend. She made claims in the letter that she had been actively using drugs. The counselor did not give this letter to the friend. At a later

time, the counselor let her and her mother know about the letter.—Witness, Julie Dawson.

1999-2000 School Year

Two ninth-grade students received counseling for the use of marijuana.—Witnesses, Russ Rutledge/Ruth Clouber.

Nine tenth-grade students received counseling for the use of marijuana.—Witnesses, Russ Rutledge/Ruth Clouber.

One tenth-grade student received counseling for the use of marijuana and cocaine.—Witnesses, Russ Rutledge/Ruth Clouber.

One tenth-grade student received counseling for the use of marijuana and alcohol.—Witnesses, Russ Rutledge/Ruth Clouber.

Two eleventh-grade students received counseling for the use of marijuana.—Witnesses, Russ Rutledge/Ruth Clouber.

One eleventh-grade student received counseling for the use of marijuana and alcohol.—Witnesses, Russ Rutledge/Ruth Clouber.

Eight twelfth-grade students received counseling for the use of marijuana.—Witnesses, Russ Rutledge/Ruth Clouber.

A seventh-grade student spoke to counselor about a party in his neighborhood. He said that he got very drunk and high on drugs. He expressed a concern and stated that he did not want to use. The counselor talked to him again about the drug use and its effects.—Witness, Julie Dawson.

The counselor visited with a seventh-grade boy at the alternative school who also mentioned the same party as

the student the counselor talked to previously. He also claimed to drink and smoke marijuana.—Witness, Julie Dawson.

INTERROGATORY NO. 11: If your response to Plaintiffs' Request for Admission 7 is anything other than an unqualified admission, state every fact, identify every witness and identify every document in support of your denial.

RESPONSE TO INTERROGATORY NO. 11: See Response to Request for Admission No. 7.

INTERROGATORY NO. 12: If your response to Plaintiffs' Request for Admission No. 9 is anything other than an unqualified admission, state every fact, identify every witness and identify every document in support of your denial.

RESPONSE TO INTERROGATORY NO. 12: The documents you have already been provided, and the documents provided to you in Response to Request for Production, Second Set, No. 3, certain documentation of disciplinary actions. The high school cannot locate its disciplinary actions. The high school cannot locate its disciplinary referrals for the 1995-1996 school year. The middle school has not determined if documentation is available for the 1994-1995 or 1995-1996 school year. However, Defendants believe the submitted documents support its denial of Plaintiffs' Request for Admission No. 9. Please advise us if additional documentation is required. The witnesses to support this denial are James Blue, High School Principal; Don Warden, Middle School Principal; Karen Kinsey, Assistant Middle School Principal; Grant Gower, Assistant High School Principal; and Roy Capps, Assistant High School Principal; Joe Hillman, former Assistant High School Principal; and Susan Foote, former Assistant Middle School Principal.

INTERROGATORY NO. 13: If your response to Plaintiffs' Request for Admission No. 10 is anything other than an unqualified admission, state every fact, identify every witness and identify every document in support of your denial.

RESPONSE TO INTERROGATORY NO. 13: Objection. This interrogatory seeks information which is burdensome as phrased. The definition of "Defendant" encompasses any employee of District and Defendant has approximately 260 employees in many different areas of administration, teaching and support personnel. Without waiving this objection, in addition to the specific known instances of drug use and parent concerns identified in these and the prior responses by Defendants to Plaintiffs' discovery, the deposition testimony of teacher Sheila Evans indicates a change in attitude among students within the last ten years with regard to the students' apparent openness and lack of condemnation in discussing the propriety of drug use. The documents provided in response to Request for Production No. 3 indicate the increase in disciplinary referrals. These give Defendants reason to believe the level of drug use by Tecumseh students may have increased over the past ten years.

INTERROGATORY NO. 14: If your response to Plaintiffs' Request for Admission No. 16 is anything other than an unqualified admission, state every fact, identify every witness and identify every document in support of your denial.

RESPONSE TO INTERROGATORY NO. 14: Dean Rogers, Board Member; Tom Wilsie, Superintendent; Danny Jacobs, Assistant Superintendent; James Blue, Principal; and Don Warden, Principal. The deposition of Danny Jacobs taken by Plaintiffs explains the District's policy for any student unable to pay the fee. A student who refuses to pay the fee would be tantamount to a refusal to submit to a drug test, the consequences of which are found in the Drug Testing Policy.

INTERROGATORY NO. 15: If your response to Plaintiffs' Request for Admission No. 17 is anything other than an unqualified admission, state the number of students who use

drugs and have parents who have used drugs, the date of each such student's drug use, and how the drug use of student and parent is known to Defendants.

RESPONSE TO INTERROGATORY NO. 15: Objection. This interrogatory seeks information which is burdensome as phrased. The definition of "Defendant" encompasses every employee of the District and Defendant has approximately 260 employees in many different areas of administration, teaching and support personnel. Further, the information sought covers an indefinite period of time. Without waiving said objection, the deposition of Dean Rogers contains information on a student who used his parents' drugs. Additionally, during the 1997-1998 school year, a seventh-grade student confided in the school counselor, Julie Dawson, of using drugs obtained from his father. Furthermore, there have been a number of occasions where students have talked to counselors about drug use in the home, without confessing to the students' own drug use. For example, in the last three years, the Middle School counselor has discussed the following:

1997-1998 School Year

A sixth-grade boy was referred to Health Department Counseling after talking with the mother about drug use in the home by the father. The Department of Human Services had intervened in the past because of the mother's drug use.

An eighth-grade girl shared that they moved from Oklahoma City to Tecumseh recently after being released by DHS. The student had previously turned her mother in to DHS for drug use in the home.

An eighth-grade girl spoke to the counselor about her belief that her mother might have acquired a disease through drug use. Shortly after the counselor also met with the father and he verified the story the child told about her mother.

1998-1999 School Year

Two seventh-grade boys who were football players went to the counselor at two separate times and they each were worried about a drug test coming back positive if they were tested. One boy was around his father when the father used marijuana. The other boy was in his mother's home for visits and said that there was marijuana use in that home.

The counselor spoke with the mother of a seventh-grade boy about the exposure that her son had to drugs when he stayed with his father. They discussed the possibility of not allowing him to see his father if he used drugs around him.

An eighth-grade boy who also has a seventh-grade sister spoke to the counselor about his father. When asked about his mother, he told the counselor that she was in jail for using drugs.

1999-2000 School Year

The counselor spoke with a sixth-grade boy about his father's drug rehabilitation. His father had a history of drug use and is receiving treatment. The boy is having a hard time with his father being away. His mother is also gone this week to help with a portion of the treatment.

A seventh-grade boy is very discouraged at home. He is not happy living with his mother. He has only lived with her for about two years because she was a drug user and had been in jail. He is not getting along with his mom and especially not getting along with her boyfriend. He has seen drugs in the house lately.

THE CENTER FOR EDUCATION
LAW, INC.

/s/ Linda Maria Meoli
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Attorneys For Defendants

VERIFICATION

STATE OF OKLAHOMA)
) ss
COUNTY OF OKLAHOMA)

Tom Wilsie, Superintendent of Independent School District No. 92 of Pottawatomie County, Oklahoma, in my official capacity, of lawful age, being first duly sworn, upon oath states that I have read the foregoing Defendants' Responses to Plaintiffs' Interrogatories, First Set, that I am familiar with the matters set forth therein, and that the same are true to the best of my information and belief.

/s/ Tom Wilsie
TOM WILSIE, Superintendent of Independent School District No. 92 of Pottawatomie County, Oklahoma

Subscribed and sworn to before me this 17th day of December, 1999.

/s/ Teresa Johnson
Notary Public

My Commission Expires:
08/21/01

(Seal)

[Certificate of Service Omitted in Printing]

DEFENDANTS' RESPONSES TO PLAINTIFFS' REQUESTS FOR ADMISSIONS, FIRST SET

Mailed to Plaintiff's Attorney on December 17, 1999
[Caption Omitted in Printing]

REQUEST FOR ADMISSION NO. 1: Admit that, in addition to the activities subject to the Drug Testing Policy,

other school-sponsored activities (for example, Beta Club) are privileges and are voluntary.

RESPONSE TO REQUEST FOR ADMISSION NO. 1: Admitted.

REQUEST FOR ADMISSION NO. 2: Admit that, in addition to the activities subject to the Drug Testing Policy, other school-sponsored activities (for example, Beta Club) involve overnight travel to other towns, cities and states; that students sometimes share sleeping accommodations during such travel; and that during such travel students are sometimes allowed free time to journey into the surrounding area without adult supervision.

RESPONSE TO REQUEST FOR ADMISSION NO. 2: Admitted.

REQUEST FOR ADMISSION NO. 3: Admit that Tecumseh students do not, by mere virtue of participation in interscholastic competitions of the Choir, Band, FHA, or Academic Team, engage in activities that pose a risk of immediate physical harm to themselves, to other students, or to the public.

RESPONSE TO REQUEST FOR ADMISSION NO. 3: Denied.

REQUEST FOR ADMISSION NO. 4: Admit that some Tecumseh students, as part of their curricular activities, engage in activities (for example, driving motor vehicles in Drivers' Education class, use of power cutting tools in Agriculture classes, or using certain chemicals in chemistry laboratory class) that pose a greater risk of immediate physical harm than competitions of the Choir, Band, FHA, or Academic Team.

RESPONSE TO REQUEST FOR ADMISSION NO. 4: It is admitted that some Tecumseh students engage in activities such as "driving motor vehicles in Drivers' Education class, use of power cutting tools in Agriculture classes, or using

certain chemicals in chemistry laboratory" tests. However, these activities are directly supervised by a District employee in a much more structured environment than students in competition. It is therefore denied that the risk of physical harm is greater or more immediate in the curricular activities.

REQUEST FOR ADMISSION NO. 5: Admit that any risk of immediate physical harm posed by participation in FFA competitions can also be faced by students enrolled in Agriculture classes or by students who participate in FFA activities other than competitions.

RESPONSE TO REQUEST FOR ADMISSION NO. 5: Denied.

REQUEST FOR ADMISSION NO. 6: Admit that Defendants' Statement of Uncontroverted Fact, filed on November 17, 1999 in conjunction with Defendants' Motion for Summary Judgment, sets forth every incident of drug usage by Tecumseh students of which Defendants have specific evidence.

RESPONSE TO REQUEST FOR ADMISSION NO. 6: Denied.

REQUEST FOR ADMISSION NO. 7: Admit that Tecumseh students are not, by mere virtue of participation in interscholastic competitions of the school Choir, Band, FHA, FFA, or Academic Team, required to (a) undergo any physical examination; (b) engage in communal undress; (c) take showers in view of other students; (d) use toilet stalls that do not have doors; or (e) acquire insurance coverage or sign a waiver of insurance.

RESPONSE TO REQUEST FOR ADMISSION NO. 7: It is admitted that no student in Tecumseh is required to engage in communal undress, take showers in view of other students or use toilet stalls that do not have doors. Moreover, only

students who participate in Athletics are required to undergo physical examinations and only students participating in football are required to acquire insurance.

REQUEST FOR ADMISSION NO. 8: Admit that Tecumseh students are not in a state of rebellion that is being fueled by alcohol and drug abuse.

RESPONSE TO REQUEST FOR ADMISSION NO. 8: Defendant is unable to admit or deny this request because it is unclear and ambiguous wherein Defendant is asked to determine what the unexplained phrase "state of rebellion" means. It is admitted that students have not engaged in protests regarding drugs. It is denied that students at Tecumseh schools who openly and unabashedly talk about and refer to alcohol and drug use as an activity that should not be condemned are not in a "state of rebellion."

REQUEST FOR ADMISSION NO. 9: Admit that disciplinary actions in Defendants' schools have not, at any time during the past five years, reached epidemic proportions.

RESPONSE TO REQUEST FOR ADMISSION NO. 9: Denied.

REQUEST FOR ADMISSION NO. 10: Admit that Defendants have no reason to believe that the level of drug use by Tecumseh students has either increased or decreased significantly over the past ten years.

RESPONSE TO REQUEST FOR ADMISSION NO. 10: It is admitted that Defendants have no reason to believe that the level of drug use by Tecumseh students has decreased significantly over the past ten years. The remainder of Request for Admission No. 10 is denied.

REQUEST FOR ADMISSION NO. 11: Admit that, to the extent that drug use exists among Tecumseh students, the students who participate in competitions of the Choir, Band, FFA, FHA, and Academic Team are not the leaders of any drug culture.

RESPONSE TO REQUEST FOR ADMISSION NO. 11: Admitted.

REQUEST FOR ADMISSION NO. 12: Admit that Defendants have no reason to believe that Tecumseh students have used drugs to enhance their performance in competitions of the Choir, Band, FFA, FHA, and Academic Team.

RESPONSE TO REQUEST FOR ADMISSION NO. 12: Denied.

REQUEST FOR ADMISSION NO. 13: Admit that participation in classroom activities is a valuable part of the educational experience of Tecumseh students.

RESPONSE TO REQUEST FOR ADMISSION NO. 13: Admitted.

REQUEST FOR ADMISSION NO. 14: Admit that, under the terms of the Drug Testing Policy (at page 3), no student shall be allowed to practice or participate in any of the following extracurricular activities unless the student has returned the properly signed "Student Drug Testing Consent Form:" Choir, Band, FFA, FHA, and Academic Team.

RESPONSE TO REQUEST FOR ADMISSION NO. 14: It is admitted that the Drug Testing Policy makes that statement at Page 3. It is denied that the Policy is applied to practice or participation in non-competitive events.

REQUEST FOR ADMISSION NO. 15: Admit that, under the terms of the Drug Testing Policy (at page 7), a student participating in competitions of the Choir, Band, FFA, FHA, or Academic Team who refuses to submit to a drug use test authorized under the policy shall not be eligible to participate in any of the extracurricular activities of the Choir, Band, FFA, FHA, or Academic Team, including all meetings, practices, performances and competitions for the remainder of the school year.

RESPONSE TO REQUEST FOR ADMISSION NO. 15: It is admitted that such statement is made on Page 7 of the Policy. It is denied that the Policy is applied to meetings, performances, or practices for non-competitive events.

REQUEST FOR ADMISSION NO. 16: Admit that Defendants do not have a formal policy to waive or cover the student fee under the Drug Testing Policy for any student who is unable or unwilling to pay the fee.

RESPONSE TO REQUEST FOR ADMISSION NO. 16: Denied.

REQUEST FOR ADMISSION NO. 17: Admit that Defendants have no evidence of a specific instance of both a Tecumseh student using drugs and the student's parent or parents having at some time used drugs.

RESPONSE TO REQUEST FOR ADMISSION NO. 17: Denied.

THE CENTER FOR EDUCATION
LAW, INC.

/s/ Linda Maria Meoli
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Attorneys for Defendants

VERIFICATION

STATE OF OKLAHOMA)
) ss
COUNTY OF _____)

Tom Wilsie, Superintendent of Independent School District No. 92 of Pottawatomie County, Oklahoma, in my official capacity, of lawful age, being first duly sworn, upon oath states that I have read the foregoing Defendants' Responses to Plaintiffs' Requests For Admissions, First Set, that I am familiar with the matters set forth therein, and that the same are true to the best of my information and belief.

/s/ Tom Wilsie
TOM WILSIE, Superintendent of Independent School District No. 92 of Pottawatomie County, Oklahoma

Subscribed and sworn to before me this 17th day of December, 1999.

/s/ Teresa Johnson
Notary Public

My Commission Expires:
8/21/01

(Seal)

[Certificate of Service Omitted in Printing]

AFFIDAVIT

STATE OF OKLAHOMA)
) ss:
COUNTY OF POTTAWATOMIE)

I, Nancy Warwick, of lawful age, depose and state:

1. I am employed as a teacher/coach by Independent School District No. 92 of Pottawatomie County, Oklahoma, also known as the Tecumseh School District ("District").

2. I have been employed by District for 17 years. I am currently assigned as teacher of the Academic Class and have coached the Academic Team for the last 12 years.

3. The curriculum of the Academic Class includes instruction in subjects such as literature, history, mathematics and fine arts, and also includes classroom activities that test the students' speed and accuracy in answering questions posed to them in those subject areas. Students who are eligible for interscholastic competition are required to perform these classroom activities for graded classroom work and also utilize the same activities as practice for interscholastic competition. Students who are not eligible for interscholastic competition for any reason are required to perform these activities for graded classroom work. The failure to perform these classroom activities will result in a lower grade in Academic Class, whether or not they choose to participate in competition.

4. There are no classroom activities in the Academic Class that are performed by students solely for the purpose of interscholastic competition. A student enrolled in and attending the Academic Class is not precluded from participating in any classroom activity.

5. For a major part of the first semester of the 1999-2000 school year, Plaintiff Daniel James was precluded from participating in competition because he failed to meet scholastic eligibility requirements. However, he was not precluded from engaging, and was required to engage, in all classroom activities conducted in the Academic Class during the school day. He failed the first term of Academic Class and received a grade of "D" for the second term because of his failure to complete class assignments.

6.Plaintiff James is not currently enrolled in Academic Class. No Academic Class is offered to students for this current term.

/s/ Nancy Warwick
NANCY WARWICK

Subscribed and sworn to before me this 18th day of January, 2000.

/s/ Ronda Tillman
Notary Public

My Commission Expires:
8-24-2002

AFFIDAVIT

STATE OF OKLAHOMA)
) ss:
COUNTY OF TULSA)

I, David Weaver, of lawful age, depose and state:

1. I am the Vice President and co-owner of Drugs of Abuse Testing Laboratory, Inc. (DATL), 4946 East 49th Street, Tulsa, Oklahoma, the company that screens urine samples for the presence of illegal substances for Independent School District No. 92 of Pottawatomie County, Oklahoma, also known as the Tecumseh School District ("District").

2. I earned a Bachelor of Science in Microbiology and Medical Technology from Oklahoma State University and have engaged in the business of screening urine samples for twenty-three years.

3. The District utilizes a Urine Substance Abuse Panel for random sample testing which screens for six substances. The substances screened and the usual detection period for the substances are as follows:

Amphetamines	1-2 days
Cannabinoid Metabolites	1-77 days
Cocaine	2-4 days
Opiates	2 days
Barbiturates	1 day to several weeks
Benzodiazepines	3 days to 6 weeks

4. The following additional substances can be detected in the urine sample for the following periods:

Ethanol	1 hour per mixed drink, beer or glass of wine
Nicotine	detected amount reduced by 50% approximately every 17 hours
LSD	1-5 days

/s/ David Weaver
DAVID WEAVER

Subscribed and sworn to before me this 15th day of January, 2000.

My Commission Expires:
9-21-2002

/s/ Michelle Neftzger
Notary Public

DEPOSITION OF DEAN ROGERS
taken on behalf of the Plaintiff on September 24, 1999,
at Norman, Oklahoma.

DIRECT EXAMINATION BY MR. BOYD:

[9] (117) [1] his name—offered me some pills on the bus.

Q. You don't know what the pills were?

A. No.

Q. Okay. How many times did you yourself actually observe students using drugs during that 72-73 school year?

A. Well, smoking the pot, probable three, three times.

Q. Did you have some reason to think that drug use was more widespread though than just the incidents that you personally saw?

A. Yes.

Q. What was your basis for thinking that?

A. Because the chief of police at Tecumseh 1had asked my daughter to look for a certain car that came on lunch hour down through there and just passed through and just kind of showed down and kids would run out there around the door and then it would just go on out across the little bridge and back up to the highway.

And she one year carried her books the whole year because the girl that she lockered which, her boyfriend and his brother sold drugs and we were confronted with that here at Norman when we came for band day.

* * * *

[1] Since this matter was presented to the District Court below on cross-motions for Summary Judgment, the evidence was attached to the Motions as required, including excerpts from depositions. As an aid to the Court, in addition to the page number of the deposition below, which is indicated in brackets preceding the deposition testimony, the page number of the Appellant's Appendix filed in the 10th Circuit is indicated in parentheses.

[39] (463)

Q. The French Club is not covered?

A. No.

Q. And all those activities you just listed what they have in common is what?

A. Competition. Competitiveness.

Q. They all involve competition?

A. (Nods head)

Q. And all the activities, all the extra-curricular activities that do not involve competition they are not included in the policy; is that correct?

A. They're not included.

Q. Okay. Can you tell me what the competition is that the FHA does?

A. No.

Q. Does the Art Club do any competitions?

A. Not at this time.

Q. I understand there's been a Math Club from time to time. I think it's defunct this year, but a couple of years ago there was a Math Club, right?

A. Yes.

Q. If the math students decided that they wanted to get together after school and see who could perform calculations the fastest, would they [40] (464) then become subject to the drug test?

A. Among theirselves?

Q. Yes, just the Tecumseh High School students.

If the Tecumseh High School Math Club members wanted to compete to see who could do the calculations the fastest, would that make them subject to this drug testing policy?

A. No, because they're not in competition with other schools.

Q. Okay. So it's competition—

A. They're just—excuse me.

Q. Go right ahead, please.

A. They're just being competitive among theirselves. They're not going out into the community and representing Tecumseh school per se as a Math Club that is going to a competition.

Q. Okay. So the key to understanding who is included under this drug testing policy is that it is students who represent the school in competitions with other schools?

A. Yes.

Q. So a competition that was just among the Tecumseh students, no matter how intense that competition was, they wouldn't be included under [41] (465) this—

A. No.

Q. —policy?

BY MS. MEOLI: Let him finish his question before you answer.

BY MR. BOYD: I'm now finished.

You can answer.

BY THE WITNESS: No.

[42] (466)

Q. Okay. Well, let's go through each one of the activities and tell me, please, if you would, how a student doing each of those activities—

A. Okay.

Q. —could get hurt or could hurt other people if they were under the influence of drugs. And please focus on the activity. I understand that you certainly believe that if a student—if anybody, if any of us were under the influence of drugs that could pose danger. I mean, that would be true sort of across the board, right?

A. Right.

Q. So what I want you to do is focus on each of those activities and if you're doing that activity what is it about that activity that becomes especially dangerous if you're under the influence of illegal drugs or alcohol, okay?

A. Okay. The athletes without a clear mind and being under the influence of drugs often don't [43] (467) know their inabilities of running and hitting someone, hitting them wrong, you know, things that would not be normally done in the way a coach would coach them to hit the person to handle theirselves.

Q. I'm sorry. So let me just—I'm going to follow-up on each of these, okay?

So the athletes could suffer physical injuries because of the physical activities they are doing, broken bones, torn ligaments and things of that sort; is that correct?

A. Yes.

Q. That's what you mean by the harm that could come to the athletes; is that right?

A. Yes.

Q. Okay. Go on to the next one, please.

A. Okay. The cheerleaders it's the same thing because they have these where they pyramid up and then drop the girl, things like this, so that could have the same effect as I spoke about the athletes.

They handle different ones in pyramids and things and they can drop them, they can fall wrong if they're not alert on how to fall.

Q. Okay. So, again, I'm going to—you go as long as you want to on the cheerleaders and then [44] (468) I'm going to ask you some questions about cheerleaders before you go on to the next one, okay?

A. Okay. Go.

Q. Okay. You mentioned the pyramid building. That's where the cheerleaders stack up on top of each other and maybe, you know, get what, 10 or 15 feet off the ground? Does that sound about right?

A. Yes.

Q. Are there any other cheerleading activities that could become more dangerous than they already are because of drugs?

A. Yes. Their acrobatic moves.

Q. What sort of acrobatic moves?

A. Well, they do backflips and splits and, you know, things like that. And if they don't land right or if they don't hit right they're going to hurt theirself plus they may hurt someone else falling into another person or something.

Q. Okay. So the pyramids, the acrobatic moves. Are there any other things that the cheerleaders do?

A. Well, when they are out in the public you don't want them loud and boisterous or you know what I mean when they're like eating at some place. [45] (469) These things all come into that, too.

Q. Okay. Tell me what you mean by that.

A. Well, when you take a group into a restaurant you want to be able to come back to that restaurant.

If you've got two or three that are not in their—control of their faculties, they may get loud and boisterous and things like that. And so if they see them that way, they don't want them coming back.

Q. Okay. Anything else with the cheerleaders in particular that you feel—

A. No.

Q. Okay. Let's move on to the next one.

A. Okay. Pom Pon.

Q. Yes.

A. It's the same thing. They do a lot of acrobatic moves, a lot of dance moves and things like that. And if they're not in their control of theirself they can hurt theirself or someone else if they wanted, because they do do a lot of dancing, acrobatic moves, running, and the things like that. And the same about going into a public place holds with them, too.

Q. Okay. The next?

[46] (470)

A. The band. The band goes to a lot of the away ball games. Of course, they perform at our home ball games.

They have concerts and things and they need—physically they need to be in control in order to march, to compilate the band movements that they are supposed to be in at that time. They need to present theirselves well.

Q. So in order to play well and to march well and to make a good impression they need to not 1be under the influence of drugs, is that what you're saying?

A. Yes. Would you like an example?

Q. Well, in a moment.

A. Okay. Okay.

Q. And I'll certainly give you a chance to give your example.

The band players don't do any acrobatics or pyramids or any of those kinds of things, do they?

A. No, no. They just do routines where they go counterclockwise and diagonal and, you know, and some things like that.

Q. I see. So there aren't any physical dangers that come up for the band members?

A. Not unless they run into each other.

[47] (471)

Q. Okay. But that—you're not saying that that's a reason to drug test them?

A. No, no.

Q. I mean, it's not fear of them hurting each other?

BY MS. MEOLI: Let him finish.

BY THE WITNESS: Okay.

BY MR. BOYD:

Q. I'll repeat it.

You're not saying that there is any danger of them seriously injuring themselves or other people; that's not a reason for this drug testing policy for the band, is it?

A. No.

Q. Okay. I think you wanted to give me an example of how the band needs to, you know, comport itself properly.

A. I have an example. My daughter was in band.

Q. Okay.

A. The boy that had offered her the pills on the bus the first day she rode the bus to school was a drummer. And he would be marching and he would just go off in left field and just beat the drums just—you know, he was staying with the [48] (472) music, but he was getting so loud and furious with it that it was drowning out everything else.

Q. So that's an embarrassment to the school as a whole?

A. Right. Right.

Q. And that incident right there, did that play a part in your wanting to include activities like band in this drug testing policy?

A. Yes.

Q. Okay. Let's go on to the next activity.

drug testing.

A. Vocal. The same thing holds as the band. They do a little dance and things like that. And they sing and we have a show choir that is vocal music. They perform. They go out into the public and perform and put on these little songs and dance with them and everything, so the same thing goes with them.

If they're not aware of where the end of the stage is or something like that, they can hurt theirself, they can possible hurt someone else, because a lot of times they are on a small stage. And so the same thing goes for them and they need to, you know, keep their mind about them.

Q. Okay.

[49] (473)

A. And they are representing the school, so they need to put their best foot forward.

Q. Okay. So I hear you saying two things and let me make sure I'm understanding you correctly.

A. Okay.

Q. One of the things is that for the choir members you do perceive one possible physical danger which is falling off of the stage?

A. Yes.

Q. Are there are any other physical dangers that the choir members face that might be increased because of drug use?

A. Not dangers, but not keeping up with the place they are supposed be and things like that. That could possibly eliminate them from competition, you know, where they wouldn't present theirself well and things like that.

Q. So being free of any influence of drugs or alcohol is important to succeeding at the competitions, right?

A. Right.

Q. It's important to putting their best foot forward to showing Tecumseh High School in their best light to the public, right?

[50] (474)

A. Right.

Q. The danger of falling off the stage, that's not really the main reason for including the choir, is it? It's more of these other things, right?

A. That could cause a physical problem. I think all of it is combined.

Q. Okay. What's next?

A. The FFA.

Q. Uh-huh.

A. Okay. The FFA is in competition in several different fields: showing their livestock, their speeches, their horticultural class. They go in competitions in all of this.

With the animals, if you don't have control of yourself you can't have control of the animal. And a 1500-pound steer getting loose isn't anything to stand in front of.

And, you know, all of the kids try helping each other catch these things when they get loose and things like that and it

happens to the best of them. But I don't feel like it would happen as much if they are in a full control of their mind and body.

Welding, you have equipment there that [51] (475) is very dangerous unless it is handled right. You have, like I said, the speech, they have competition in the speech and they need to be in full capacity in order to present theirself well in the speech contest. The horticultural team goes out and goes into competition on plants and things like that. They have a beef and dairy competition. These are just things that the different—a livestock judging team—that you have to be in full capacity of your being in order to have a clear mind in order to compete in these. And the only reason you're competing in it is to help you bring your school to the forefront in these competitions.

Q. And being under the influence of drugs or alcohol would decrease the team's ability to win at these competitions; is that right?

A. Right.

Q. And that's one of the reasons for the policy?

A. Yes.

Q. Okay. You also talked about, though, for FFA that there are some potential dangerous involved in handling animals and I guess welding as

* * * *

[58] (476) pounds and that's what they're the—all of students try getting their steers up to for show.

Q. Okay. So just to make sure I understand. The steer that got loose from the student that you believe was under the influence of drugs is exactly the same kind of animal and the same size animal as the steers that get loose on a very regular basis from the smaller students?

A. During the last two shows we haven't had any steers get loose, so it's not all the time. But they would be—they would be approximately the same size.

Q. Aside from this incident of the steer getting loose in the 1970s from the student under the influence of drugs, are you aware of any other examples of a student—well, hold on. Let me strike that, please.

No one was injured in that incident involving the student who was under the influence of drugs in which the steer got loose, were they?

A. Yes. One of the fair board members was injured. His collar bone broke, had an arm or shoulder pulled out of, (indicating) place. Yes.

* * * *

[61] (477)

Q. And are there any other incidents involving drugs or alcohol in FFA activities?

A. There's been an FFA student who was stopped and had paraphernalia and things in his car.

Q. That was not in connection with FFA activities?

A. Not at the actual competition, but he was an FFA student.

Q. Okay. Are there any other incidents?

A. No.

Q. I want to go back for a second to the second incident you described in which a student may have been under the influence of drugs and an animal got loose. What year did that take place?

A. '90, '91.

Q. And was anyone hurt during that incident?

[62] (478)

A. He was.

Q. What were his injuries?

A. He ripped his arm from the elbow down to his wrist, (indicating).

Q. So he had a cut from his elbow to his wrist?

A. Yes.

Q. Do you know whether the cut required stitches?
A. Someone took him to the AM/PM clinic.
Q. Could you tell me what that stands for, please.
A. The 24 hour.
Q. Oh, the AM/PM?
A. Yes.
Q. I get it. I thought it was some acronym for something?
A. No. And I don't really know whether he got stitches or not. I didn't see him the rest of the day. And then my grandchild wasn't showing the next day, so I wasn't out there. I don't know.
Q. Do you know anything else about his injury, whether he came back to school, whether he had to stay in the hospital? Do you know anything about that?

[63] (479)

A. No.
. . .
A. Academic team, I don't know that it would be physical. They're competing, but they have to present themself well to us and to, you know, whoever they're competing with.
Q. Okay.
A. But as far as the physical they shouldn't unless they fall down or something like that. They shouldn't be really physical unless they're horseplaying, you know what I mean.

* * * *

[67] (480)

And I feel like whether it is physical or nonphysical since athletes and all of those have to be, I think it's only fair that they be tested, too.
Q. And there's not any element of physical danger there, is there?
A. No.

Q. And there's not any factor of them embarrassing the school while they travel, right?
A. Right.
Q. It's simply that, in your opinion, the students who represent the school in competition need to put forth their best effort and best represent the school and that drugs might interfere with that; is that right?
A. Correct.
Q. Students go on trips for a variety of extra-curricular activities that do not involve drug testing, wouldn't you agree?

[68] (481)

A. Yes.
Q. For instance, the Beta Club has gone to conventions, right?
A. Right.
Q. And classes go on field trips, right?
A. Yes.
Q. Students even visit prisons as a field trip, right?
A. Yes.
Q. And for those activities the students are not subjected to the drug test; is that correct?
A. That's correct.
Q. In terms of classroom activities and I'm not talking about competitions here, I'm talking about activities during the school day in the classroom, there are some classes that involved welding, correct?
A. Yes.
Q. And a student who enrolls in that class is not subjected to drug testing because of being in that class, are they?
A. They would be because they are in FFA.
Q. Is it possible for the student to say I don't want to do the FFA activity; I just want to do the class?

[69] (482)

A. That is part of the FFA. Those teachers that do the FFA, the agriculture, they are and so you become a member of the FFA.

Q. So for those students who are a part of the FFA, they are subject to this drug testing policy?

A. Yes.

Q. You're sure about that?

A. I understand that all FFA members that it is an elective subject, they do have competitions. They may not have in the welding, but they have in the past. And I don't know what their plans are for this year. But, yes, I would say yes, they would be tested.

Q. When you say they would be testing, you are talking about the students who enroll in the FFA close would be drug tested?

A. Yes.

[70] (122)

Q. Okay. Now you say that it did come up, the subject of drug testing did come up from time to time. Since 1995 you have been on the school board; is that right?

A. 94-95, yes.

[71] (123)

Q. 94-95. And it's come up a number of times—

A. Yes.

Q. —since 94-95 during school board meetings?

A. We have talked about it periodically as new business. It was never on the agenda, but we have discussed it as new business at different times.

Q. Would you say it's come up at least once every year since you have been on the board?

A. Yes.

Q. Even more frequently than that, do you think?

A. The last two years, the year before we implemented it and the implementation of it last year, yes.

People—we were considering it more often than what we had in the past. And people all around the community were becoming more aware and opening up to the fact that we had a drug problem.

A. Yes.

Q. Okay. Can you think of any other tools that the school has for addressing drug issues?

A. We have the drug free program. We try

[72] (485)

Q. Okay. Well, let's just take the first say three years that you were on school board. And you were describing the issue of drug testing coming up from time to time. Why did the school board not go ahead and pass a drug testing policy during that period?

A. Because some of the school board members didn't think we had that much of a problem. But if you speak to them today they will tell yes, we do.

* * * *

[77] (489)

Q. Now was there a time when the conversation about drug testing shifted from one that was just sort of general comments not on the agenda to the board getting serious about a drug testing policy?

A. Yes. I think the spring of '98, I'm going back in my mind. The spring of '98 we had talked about it.

We felt—several parents had called, several parents in the grocery store had talked to [78] (124) me about it, even some grandparents had talked to me about it, that they felt like it was getting worse. And so even in the spring we were, you know, were more conscious that more people were waking up to the fact that we had a drug problem.

Q. So it was during the spring of 1998 that the board started to focus on possibly putting together a drug testing policy?

A. Uh-huh. Yes.

Q. And was there a particular meeting or a particular moment when somebody formally said let's go ahead with this, let's more forward with the drug testing?

A. I think we just felt that it was something that we needed. And then in the fall was when some of the parents started talking about it. But I think we had already talked about it and, you know, knew we needed something because the people were stopping us, not only me, but other people and people were calling the board members, you know, about the drug situation. And then, of course, there was the time that Kay came to the school board.

Q. Who is Kay?

A. DeSomer. She's a parent.

[79] (491)

Q. Tell me about Mrs. DeSomer coming to the school board.

A. Well, she first called me at home and told me that they were having a problem with her son and that they were trying to handle it. But she felt like we needed to know that there were others that was taking drugs. And she said that, you know, she felt like something needed to be done because the other parents she said didn't—you know, they didn't want to hear that their child was taking drugs. And so I just advised her to call the school board, get on the agenda, you know. That's the only way you are going to get it in front of the board is to put it on the agenda, and she did so and she came to the meeting and presented it. But at this time we had already been talking about drug testing. And then we had a community meeting where we invited the community in to talk, you know, to tell them what we planned to do. Did they have any input they wanted to put in or do they have any

objection to, you know, drug testing. We gave them the opportunity to be able to participate in our writing up the drug

* * * *

[82] (492)

A. My granddaughter coming home and telling me that so and so came back to class and he was bombed out and even the teacher asked him if he was okay. It was obvious to the students and to the teacher that something was wrong with him. Then I had a student call me and tell me that some boys were passing around a marijuana cigarette in her English class. And I asked no names or anything because if you start pushing they don't tell you anything.

Q. Well, it certainly sounds like that during, you know, the first part of 1998 on into the summer there were a lot of things going on that were prompting you to move towards doing this policy. And part of what I need to do is to try to, you know, get a list of those things and really nail it down so let me go through them, okay?

A. Okay.

Q. You got a call from a student concerning a marijuana cigarette being passed around in class. That's one thing, right?

A. Yes.

Q. Your granddaughter told you about a student being, in your words, bombed, right?

A. Yes.

[83] (493)

Q. That's a second thing.

Ms. DeSomer called you with concern about drug use in the school?

A. Yes.

Q. And she ended up also testifying at the school board, so that would be a third thing?

A. Yes.

Q. There were conversations you had in the supermarket?

A. Yes.

Q. Can you help me get a sense of how many conversations those were or tell me the ones you remember. And, again, I want to keep you in the time frame of say between January 1st, 1998, and when the school actually implemented the policy.

A. Oh, probably five during the spring and the summer. The supermarket is a place where you see people you don't see every day and it takes you an hour and a half to get in and out.

Q. That's the social center of most towns, I know that. And were those five conversations or those approximately five conversations, were those all the same thing or can you tell me how they might have been different if they are different?

[84] (494)

A. One of them was with a clerk. Her daughter had skipped school and gone to her boyfriend's. And she made the statement that she knew they were smoking pot and she was very upset that her daughter had skipped school and that something needed to be done.

Q. Okay.

A. That's one in particular because the daughter came in about 15 minutes later and was very belligerent, just flung herself in front of some people between me and the people that were waiting, and very unrespectful to her mother. Wanting to know who she was talking to and why was she talking about her and things like that, and I just turned around and told her she's talking to me.

Q. Okay. That's one of the conversations. Can you remember any of the others?

A. Yes. They come up and they start, you're are doing a good job, but so and so teacher down there, you know, and they go on and then they would end up getting into the drug

problem. They would list several things that they weren't happy with and then they would end up saying, and I think we need to do something about the kids in the park smoking pot and things like

* * * *

[95] (495)

Q. Do you recall who first mentioned that the policy might ought to include people other than just the athletes?

A. Me.

[96] (496)

Q. Tell me as best you can what you said in that school board meeting.

A. I just said I didn't think it was fair just to test the athletes when you have other people out there in competition representing our school.

Q. And what response did other people make to that comment?

A. We had a discussion about it, about the ones that were competitive, and we asked him to implement that into it.

Q. Okay. That discussion you had, can you remember what any other individual board member said?

A. They all started naming off different organizations because each one of us has a different organization that's our pet and, you know, things like that.

Q. So when you first said I think we ought to include the non-athletes who do competition, did anybody disagree with that?

A. No.

Q. Did anybody even express any reservations or questions about it or there was immediate agreement by all people that that should be done?

[97] (497)

A. It was—like I said, we discussed it and they felt like that it was a good thing and that we went ahead and asked him to implement that into it.

Q. Now you said everybody proposed different activities and you proposed FFA as an activity, right?

A. Yes.

Q. Were there any others that you proposed?

A. Band.

Q. Band. And why is that one that was, you know, in your mind?

A. Because that's what my kids were active in.

Q. Okay. And you were in the Band Boosters also, right?

A. I was in the Band Boosters, I was in FFA Boosters, still am. I was in the athletic booster clubs.

Q. Right. Of course, the athletes were already included?

A. Yes.

* * * *

[100] (498)

Q. Okay. Now this issue of drug testing all the students did come up at some point in a board meeting, didn't it?

A. As a gesture, but we knew we couldn't.

Q. How did you know that?

A. Just knowing that it's mandate for them to go to school. They have to go, but they don't have to be in extra activities.

Q. Okay. Do you remember when that discussion took place where people, you know, brought it up as something they would like to do?

A. I don't know what the others did. I was the one that made the statement.

Q. Do you remember which meeting you made it in?

A. No, I don't.

* * * *

[103] (499)

Q. And you knew when this policy was being discussed that you—that the school could drug test the athletes, right?

A. Yes.

Q. And you wanted to add others to that list to the extent that it would be permissible to do so, right?

A. Correct.

Q. Now you draw the line at competitions at 1including in the policy non-athletic extra-curricular competitions because you believed that this would be legally permissible, right?

A. Yes.

* * * *

[105] (500)

Q. Do you think it also sends a message to the community that Tecumseh School District will not tolerate drug use?

A. I hope so.

Q. That's also part of the purpose is to send a message to the community about the school's tough on drug stance; is that right?

A. Yes.

* * * *

[138] (126)

A. There was the incident of the car or hearse whichever you want to call it coming to and parking at lunch hour and all the kids flocking around and there was money passed and things like that.

Q. When was that?

A. That was in '74. '73 or '74.

Q. And it was never established whether drugs were involved there but it was suspicious because of the children flocking to it and money being passed back and forth?

A. Right.

Q. Okay.

A. Okay. There was the football team my son played on, one of his friends had left a bag at my house and it had paraphernalia and stuff in it.

Q. And when was that?

A. That would be '78.

Q. Where there drugs in the bag?

A. No. Just the paraphernalia, a roach [139] (127) that you use to smoke the marijuana and some stuff like that and I called his mother and told her.

Q. What was the other paraphernalia besides the clip?

A. The thing that he—the drug, you know, and then there was a pipe in there. There wasn't any gym clothes or anything.

Q. Okay.

A. It was just paraphernalia.

Q. And was this paraphernalia used to consume marijuana, in your opinion?

A. Marijuana, LSD, or crack or . . .

Q. And how is LSD consumed?

A. Well, I don't know that it was, but he had the spoon that they heated the crack.

Q. Okay.

A. They had this stuffed in the bag.

Q. This was 1978?

A. Uh-huh.

Q. Okay. What's the next incident you can think of?

A. That is going back a ways. There were parties that the boys went to that there was marijuana smoked.

Q. When you say the boys, you are referring [140] (128) to your son?

A. My son and his friends, yes.

Q. Okay. And how do you know that there was marijuana smoked there?

A. Because my son told me.

Q. Okay. And did he see them or he smelled it? How did he know?

A. He smoked it.

Q. He smoked it him, okay. And when did that happen?

A. That was in—I guess his junior year. It would be '79.

Q. Okay.

A. There's been incidents where they have stopped the kids and found marijuana cigarettes or a bag of marijuana, that's the police reports.

Q. Okay.

A. There have been—

Q. Wait just a second.

A. Okay.

Q. If you can, please, refer to specific ones that you remember of, you know, when you have read a police report of a Tecumseh student being found to have drugs.

A. One of the boys that ran with my son was [141] (129) stopped and he had some marijuana.

Q. When was that?

A. That was probably the year they were—probably '80.

Q. Okay.

A. They also found some marijuana and I don't know exactly in year wise what this is. One of the meter readers from the gas company found some marijuana rolled up down at what is the junior high now and stuck up in a little crack up under the pipes where the meter is.

Q. Can you give me a range of what dates that might have been, what decade you're talking about?

A. Well, this would probably be somewhere in the middle '80s.

Q. And you say now it's the junior high. What was it then?

A. It was—it was the mid high then, too.

Q. Okay.

A. But the high school used to be there so I'm trying to think in relation to who is where when.

Q. Okay. So sometime during the '80s a gas company meter reader found rolled up marijuana at [142] (130) the junior high school?

A. I would around '85, '86, somewhere in there.

Q. Do you know how much marijuana it was?

A. It was a sandwich bag with about a third filled, he said.

Q. Who said that?

A. The guy that was trying to read the meter.

Q. You know about this from a newspaper account or a conversation?

A. No. I know this from him.

Q. Okay.

A. And I don't know whether he reported it 15 to anyone or anything. He just came in. So let me see, that takes me through—now the incidences where the kids weren't actually in school but were using during school after they got out, there's—

Q. Well, hold on. For now I want you to limit incidents involving people who actually are students.

A. Okay.

Q. Not necessarily just in school, but while they're students as opposed to—

[143] (131)

A. Okay.

Q. —somebody who, you know, was a student 10 years ago and later on they went on to get involved with drugs, okay? So staying on the list of incidents involving drugs and individuals who were at that time students in Tecumseh schools.

A. Okay.

(Discussion off the record)

A. In the '80s I'm not as aware of students. My grandson did tell about one having beer in his pickup, one having a marijuana cigarette at school, but I don't have as much recognition in the '80s because my grandson had a very limited contact with those students.

Q. Okay. Let me just make sure I do. The two incidents you do know of though is that your grandson told you that he heard of or saw?

A. He saw the beer.

Q. Okay. He saw a student having beer in the pickup truck and he heard of or saw one student having a marijuana cigarette at school. Did he hear about or see it?

A. He saw it.

Q. Okay. So there's those two incidents?

[144] (132)

A. Yes.

Q. Okay.

A. And let's see, okay. So that gets me through the '80s because he—then in the '90s he had the—he was at a party.

Q. He?

A. My grandson—

Q. Okay.

A. —was at a party with his girlfriend and his friends and the friend's girlfriend found her mother's stash and they started passing it out and him and his girlfriend left.

Q. When was this, approximately?

A. '91, somewhere in there. It was before he graduated.

Q. And when you refer to a stash, you mean marijuana?

A. Yes.

Q. Did your grandson report how much marijuana there was?

A. He didn't say.

Q. Did he report how many students he saw using the marijuana?

A. He didn't say.

Q. Okay. Any more?

[145] (133)

A. No. Just that when they tell me things like this I really don't question them close because they'll quit telling me things.

Q. And what I mean are there any more incidents?

A. Oh, let me see.

BY MS. MEOLI: Any more instances.

BY THE WITNESS: Oh, let me see.

I can't right off hand think of anything other than the girl that called and told me that they were passing a marijuana cigarette around in the classroom.

BY MR. BOYD:

Q. And that was in 1998, right?

A. The 97-98 school year.

Q. Okay. Does that complete the list of incidents that you recall in which Tecumseh school students were using drugs?

A. I heard a conversation with one of the boys that was in FFA. And he was inviting some boys to a party and he said, I'll have plenty of smoke, which meant marijuana.

Q. Okay. I'm sorry. Tell me that again,

A. I heard it.

Q. You heard—

[146] (134)

A. I heard—

Q. —it.

A. —the conversation. He was inviting some boys to his home for a party.

Q. This was during an FFA activity or what's the context?

A. It was—they were there getting ready getting their animals ready to show at our local show.

Q. Uh-huh. Okay. And the student invited—tell me again in your words what the student advised.

A. He invited some boys that were standing there with him to come to his house for a party and that there would be plenty of smokes.

Q. Did he say anything else to indicate that there would be drugs there?

A. No.

Q. And when did that happen?

A. The 97-98 school year.

Q. Okay. So let me ask again, does that complete the list of all incidents that you're aware of in which a Tecumseh school student was involved with drugs?

A. Except the one I told you about my [147] (135) granddaughter saying the boy was bombed out and the teacher asking him if he was all right.

Q. Okay. When did that take place?

A. The 97-98 school year.

Q. Does that complete the list of incidents that you know of in which a Tecumseh student consumed or possessed illegal drugs?

A. Yes.

BY MS. MEOLI: Other than what she has already testified to?

BY MR. BOYD: Is that an objection?

BY MS. MEOLI: Yes. Or I would like to clarify your question. Let me clarify your question. The list that she gave you right now, is that the question that you're asking?

BY MR. BOYD: My question is the list that she has given me during this sequence of questioning, does that complete the list of incidents involving—well, I think my question has been asked and answered.

BY MS. MEOLI: Okay.

BY MR. BOYD:

Q. Do you have any responsibility as a

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[153] (535)

Q. And the students who get scholarships to Ag. schools, would they be able to get those scholarships if they stayed away from the competitions?

A. I don't know that they get the scholarships, but they would not be denied the education from the colleges if they applied.

* * * *

CROSS EXAMINATION BY MS. MEOLI

[170] (136)

Q. Ms. Rogers, first Mr. Boyd asked you about all your knowledge of drug use. And in the morning hours of the deposition you had made a statement about your daughter having a locker room—I mean, having a locker with a friend of hers whose boyfriend was a drug dealer?

A. Yes.

Q. Is that one of the knowledgeable instances of drug use that you knew of in the school district?

A. Yes.

Q. Okay. You also earlier on in the deposition talked about a student who was arrested in the FFA for having marijuana in a car.

A. I don't know that he was in FFA, the one that had the marijuana in the car. Now, the one that had the paraphernalia.

Q. Okay. And which instance was that? Is That—I'm sorry.

A. Okay. Go ahead.

Q. Is that one of the instances that you listed for Mr. Boyd?

A. No.

Q. Okay. Why don't you explain that instance us to.

[171] (137)

A. The one that—

Q. I'm sorry. Go ahead.

A. The one that had the marijuana found in the car?

Q. Yes.

A. Okay. They come back from lunch, the students had, and the drug dog was brought in. There was no suspicion or anything at that time. This was just a regular routine drug dog. And the dog hit on this car and there was marijuana in it.

Q. And when was that, if you remember?

A. 97-98 school year.

Q. Okay. Did you also mention an instance this morning about a student that had marijuana that was in the FFA?

A. That had what? I'm sorry.

Q. Marijuana that was in the FFA.

A. There was one that had the paraphernalia in his car.

Q. Would you tell us about that instance.

A. Well, they picked him up for speeding or something and when they got to searching, well, there was paraphernalia in the car and like that. Now I don't know that there was drugs, but there was the things to use drugs.

[172] (138)

Q. And when was that, if you can remember?

A. That was I would say March or April of this spring. It would be '99.

Q. Okay. That was 1999?

A. Uh-huh.

Q. Okay. Have you ever chaperoned any dances where marijuana was found?

A. Yes.

Q. And how many times did that occur?

A. It occurred one time.

Q. Can you give us, if you can, a year or an approximation of when that would have happened?

A. 1975.

Q. You mentioned your son at one point and a friend.

A. Yes.

Q. You had personal knowledge of marijuana use through your son?

A. Yes.
Q. And his friend?
A. Yes.
Q. Any other type of drugs that were used by your son and his friend while he was at Tecumseh?
A. I found out later that there were Quaaludes.

* * * *

RE-DIRECT EXAMINATION BY MR. BOYD:

[216] (139)

When you were talking with Ms. Meoli earlier you said that there was a drug problem in the 1970s and that there is a drug problem today. Do you remember saying that?
A. Yes.
Q. Could you define for me what you mean by a drug problem.
A. Yes. There are kids out there that are taking drugs. We have second generations taking drugs that stem from the ones in the '70s that are—now their kids are taking drugs. And by the actions and the word around, the things that have happened down in the park that people that live there close have observed, some of the things that the police have observed, we do have a drug problem.

* * * *

[245] (562)

Q. When you refer to the drug problem at Tecumseh you mentioned it in the 1970s and the 1990s, would you say that the drug problem has remained steadily present throughout the 1970s, '80s and 1990s?
A. Yes.

* * * *

[256] (564)

The students who tend to be involved in drugs, are they also the ones most likely to be choosing extra-curricular activities?

A. Yes, they do.
Q. Yes, they do or yes, they are the ones—the students who are involved in drugs are the ones that are most likely to go into extra-curricular activities, in your opinion?
A. No. You said most likely.
Q. Okay. Well, I'm sorry. Why don't you tell me—put this in your own words, please.
A. We have students that are on drugs, use alcohol, and they are in extra-curricular activities. There are probably more that are not in activities.

* * * *

DEPOSITION OF JAMES BLUE,
taken on behalf of the Plaintiffs, October 25, 1999
at Norman, Oklahoma.

DIRECT EXAMINATION BY MR. BOYD:

[38] (578)

Q. Okay. How was the bag—well, first, let me just ask you this. Is it true that the marijuana was found just in the parking lot?
A. Okay. I'm confusing two incidents in my mind. There was never a bag as such found. You kept referring to a bag of marijuana?
Q. Well, that's what Mr. Jacobs told me.
A. Okay.
Q. But you can set me straight.
A. Okay. We found—there were three marijuana joints found beside a log that marks a parking area, utility poles that are laid over. There were three marijuana joints found at that log tucked underneath.
Q. And this was around the beginning of 1998?

BY MS. MEOLI: I'm sorry. In the beginning of the calander year or the school year?

BY MR. BOYD: Yes. Around the beginning of the calander year of 1998.

BY MS. MEOLI: The calendar year, okay.

[39] (579)

BY THE WITNESS: Okay. Yes. It was in that spring term, yes.

BY MR. BOYD:

Q. Okay. And were those three marijuana cigarettes ever tied to a particular student?

A. Those were not.

Q. And I take it no students were disciplined because of that incident?

A. No.

Q. No, they were not disciplined?

A. They were not.

Q. How were they found, the marijuana cigarettes?

A. With the Dogs Against Drug, the canine came around and visits the school regularly and does parking area searches, in the building searches, locker searches.

Q. Okay. And you told me that this log, this telephone pole marked the boundary of the parking lot; is that right?

A. Yes, one of the boundaries.

Q. Okay. Was this a boundary that abuts the street or not?

A. No. It abuts the baseball field.

Q. Okay. Is the parking lot itself fenced [40] (580) off?

A. No, it is not.

Q. So a member of the public could certainly pass through there?

A. Certainly.

Q. Now you said you had in mind another incident, too, that you were perhaps confusing this with. Tell me what that other incident was.

A. We did have the dog also hit on a car, a vehicle, and it did have a small amount of marijuana in it.

Q. Okay.

A. That student was subsequently disciplined.

Q. Where these two incidents on the same day, the same drug dog?

A. No. They were not on the same day. There were not in the same month to my knowledge.

Q. But they were both in the spring of 1998?

A. Yes.

Q. Okay.

A. Maybe they weren't. I don't know.

* * * *

[56] (####)

Q. And if she reports to you interest in a particular student what do you then do?

A. We normally will bring the student in and interview the student, assess the situation ourselves, send this referral home to parents.

Q. Okay. I want you to be more specific. In interviewing a student what do you ask?

A. First of all we can tell ourselves if the odor is strong, okay? We will ask where he's been, what he has been doing, has he been involved in activities that might lead to the drug dog hitting upon him, where he was at lunch.

Q. How long does such an interview typically take?

A. Five to 10 minutes at the most.

Q. And am I correct in understanding that you make some kind of judgment call about whether or not you're suspicious of that student being involved with drugs based on the interview, the smell, the appearance of the student; is that right?

A. Correct.

* * * *

CROSS-EXAMINATION BY MS. MEOLI

[170] (616)

Q. Let me go back to this policy a second.

The activities that are under this policy, is there some kind of a connection that all of them have together?

A. Yes. They're under the OSSAA for the most part. They're under eligibility criteria for competition.

Q. Okay. Are there any other activities in the Tecumseh High School that are regulated by the OSSAA with regard to their eligibility?

A. Only if you don't have enough grades for the year. Then we just impose. I don't know if the OSSAA imposes any, but we impose a six-week ineligibility period for those that have not passed.

Q. Ineligibility for what?

A. It could be anything.

Q. For anything?

A. Uh-huh, any activity. Mainly their activities associated with the OSSAA though.

Q. I don't understand.

A. Okay. You're going to be a participant and you're going to miss school, then you will be [171] (617) ineligible to go if you are not passing your classes. Our eligibility really is ran for everybody.

Q. Okay. They would be not eligible to go where?

A. Anything that takes them away from a class.

Q. So you mean for a field trip or is that what you're talking about?

A. It could be field trip.

Q. It could be a field trip?

A. Right.

Q. And that happens at the beginning of the school year?

A. Yes.

Q. Okay. My question to you was, is there any other activity in Tecumseh High School that is covered by the OSSAA rules and regulations?

A. No. There are not, no.

Q. Is it your understanding that if an activity becomes eligible for the OSSAA regulations that that—it would then be covered under this policy?

A. Yes. That's my understanding.

* * * *

RE-DIRECT EXAMINATION BY MR. BOYD

[181] (621)

Q. Do you remember we talked about a student who did test positive last year and who was on the wrestling team, right? Do you remember that?

A. Yes.

Q. Now in the student handbook there are listed two sponsors for the wrestling team. Does that remain for—rather was that true last year that there were two coaches?

A. Right.

Q. So in terms of who would have a need to know about the test results it would actually be both of them, right?

[182] (622)

A. The coaches, yes.

Q. Both coaches?

A. Yes.

Q. How many coaches are there for the football team?

A. Five to six.

Q. And how many sponsors are there for FFA?

A. Three.

Q. And would you disagree with me if I showed you from page 5 of the student handbook from last year there actually were seven football coaches listed?

A. No. There could be seven.

Q. Okay. So a student who was in FFA and on the football team who tested positive, the people who would have a need to know the test results would be the three FFA

sponsors, the seven football coaches, yourself, and then obviously the superintendent and assistant superintendent, they would all end up knowing the test results; is that right?

A. The assistant superintendent would. I don't know about the superintendent. And the need to know is the head coach.

Q. Well, you told me that both of the [183] (623) wrestling coaches found out, right?

A. They probably did, yes.

Q. So there's no reason to think that the football coaches wouldn't all find out also, right?

A. They could.

* * * *

[185] (1028)

Now, national studies show that band, vocal and other non-athletic, extra-curricular activity students, they are the least likely of all students to use drugs. Would you agree that this same—that the same thing would hold true for Tecumseh High School students?

A. No, I would not.

Q. What's the basis for you saying that?

A. I have no basis for saying yes or no.

Q. Okay. So you really don't know?

A. I just know all age levels, all categories as we—if we're categorizing the students all frequent the park. You see, that is on the direct path to the lunch facilities, restaurants, and so forth so they all go through there.

* * * *

DEPOSITION OF GRANT GOWER,
taken on behalf of the Plaintiffs, October 26, 1999,
at Tecumseh, Oklahoma

DIRECT EXAMINATION BY MR. BOYD:

[9] (656)

Q. Okay. Mr. Blue said that one student tested positive during the current school year. Do you remember right at the beginning of the year there was the testing for a number of people and it ended up not being completed?

A. Yes.

Q. And he said that one student tested positive this year; is that correct?

A. That is correct.

Q. And there was only one student?

A. Yes.

Q. What was the substance that student tested positive for?

A. Marijuana, I believe.

Q. Do you have any doubt about that?

A. That was what the report came back as.

Q. Okay. What activity did that student do that caused him to be drug tested in the first [10] (657) place?

A. Softball.

Q. And was that the only activity that caused him to be drug tested?

A. To my knowledge, that's all I know is that she was a fast pitch softball player.

* * * *

DEPOSITION OF LINDSAY EARLS,
taken on behalf of the Defendants, on September 26, 1999,
at Oklahoma City, Oklahoma.

DIRECT EXAMINATION BY MS. MEOLI

[25] (178)

Q. That's fine. I also, Lindsay, saw you on Good Morning America either the day of or the day after the lawsuit was filed. In that program, Charlie Gibson asked you if there was a drug problem in Tecumseh, and you said yes.

[26] (179)

And then he asked you if the drug problem was widespread, and you said yes. Do you remember making those statements to Charlie Gibson?

A. Yes, I do.

Q. Were those two statements, the statements to the Shawnee News Star and the statements that you made to Charlie Gibson on Good Morning America, correct?

A. Yes.

MR. BOYD: Hold on. Let me just ask a question. That's a very vague question, Are they correct? Did she say those things, or does she agree with their content?

MS. MEOLI: Does she agree with their content?

THE WITNESS: Oh. Well, at that time, I guess I did. Now I'm not so sure. Now I have thought about this, and I've never seen anyone doing drugs, engaging in drug use, at school or anywhere else. And I'm not sure how true those statements are.

* * * *

[29] (180)

Q. Well, you said you based your belief on the discussions you have with your friends, that there is not a widespread drug problem in Tecumseh. And what I'm asking you is: What were those discussions that you had with your

friends to base your opinion that there isn't a widespread drug problem in Tecumseh?

A. I haven't said that there isn't a widespread. I'm not sure if there is or not.

Q. Okay. That's fair. So is your testimony that you do not know whether or not there is a widespread drug problem in Tecumseh?

A. Yes.

Q. And is your testimony that you do not know whether kids in extracurricular activities do drugs or not?

A. Yes.

* * * *

[37] (185)

Q. Have you ever gone on any overnight trips with the choir?

A. Yes.

Q. Have you ever slept over in hotels with the choir members?

A. We slept in the Salvation Army place in Enid. It wasn't a hotel, but we slept over.

Q. How many kids were—You don't have to give me an exact number, but about how many kids slept in the Salvation Army with you?

A. I don't know. It was all the choir and all the band my freshman year. I don't know how many kids there were.

Q. What were the sleeping arrangements there?

A. The girls were in one room and the boys were in another.

Q. So all the girls slept together in one year and all the boys slept together in another room?

A. Yes.

Q. Was it like a slumber party?

A. Yeah.

Q. What kind of restroom facilities did they have in the Salvation Army?

A. I think there were two for the girls and two [38] (186) for the boys.

Q. Now, two, do you mean two stalls in a restroom or two restrooms?

A. There was one restroom with stalls and then one with a bathtub for the girls. I don't know about the boys' bathroom arrangements.

Q. Okay. So one of the rooms just had a bathtub in it?

A. It had a bathtub and a sink, I think.

Q. A bathtub and a sink. And then the other room had bathroom stalls?

A. Yeah.

Q. Do you remember how many stalls were in that bathroom?

A. No.

Q. Were there a number of stalls?

A. I think there were four or five, probably.

Q. And would it be fair to say that there were probably more than 20 girls sleeping in the room together?

A. Oh, yes.

Q. Would it be fair to say more than 40?

A. Probably close to 40 or 50.

Q. Tell me how all those girls handled the restroom facilities that night, Lindsay.

[39] (187)

A. Probably all of them.

Q. I'm sorry. That question was a little awkward. Were there a lot of girls in the restroom at one time?

A. Yes.

Q. Were there dressing rooms, private dressing rooms where you dressed and undressed for bed?

A. We got dressed in either the bathroom or in our room where we slept.

Q. And in your room is in the room with the other more than 20 girls?

A. Yes.

Q. And when you got undressed to go to bed, in either the restroom or in the room where you slept with the other girls, there were other girls there?

A. Yes.

Q. Did that embarrass you?

A. No.

Q. How about with the Academic Team, have you gone on any trips recently with the Academic Team?

A. Yes.

Q. Where did you go?

A. We went to Chicago.

Q. And when did you go to Chicago?

[40] (188)

A. In May.

Q. May of this year?

A. Yes.

Q. How many kids went up to Chicago with the Academic Team?

A. There were five of us.

Q. Was it an overnight trip?

A. Yeah.

Q. What were the sleeping arrangements—

A. We stayed in college dormitories.

Q. What college?

A. Lake Forest.

Q. Lake Forest?

A. Yes.

Q. That's a coincidence.

A. Yeah.

Q. How many—Well, were all of the kids on the Academic Team one gender?

A. No.

Q. Did all the girls stay together?

A. There was only one of me.

Q. Okay. So I gather all the boys stayed together?

A. Yes, they did.
Q. Did you have your own private room?

[41] (189)

A. I shared a room with a girl from another school.
Q. And she was on the Academic Team for the other school?
A. Yes.
Q. Had you ever met her before?
A. No.
Q. Did you both sleep in the same room?
A. No.
Q. What was—You said you shared a room with another girl.
A. Well, there were two girls hooked together, like a dorm, and she slept in one and I slept in the other, because there were only two of us.
Q. So there was one sleeping room attached to a second sleeping room?
A. Yes.
Q. And where was the restroom?
A. Between the sleeping rooms.
Q. Between the sleeping rooms. So both of you shared the same bathroom?
A. Yes.
Q. How about any other trips with the Academic Team?
A. Not where we stayed overnight.

[42] (190)

Q. How about any other trips with the choir where you stayed overnight?
A. I don't think so.
Q. How about band?
A. This is my first year and we haven't yet. I don't know if we will, but we haven't.

Q. Are there any other extracurricular activities which allowed you to go to another city and sleep over?
A. No.
Q. How long were you up in Chicago?
A. Four days, I think.
Q. Four days?
A. Maybe five.
Q. And there were five team members?
A. Yes.
Q. How many adults went with you?
A. Three.
Q. And who were those?
A. Ms. Warwick and her husband, and one of the kid's grandpa came with us.
Q. Okay. Did you have any free time when you were up in Chicago?
A. Uh-huh. Yes. Sorry.
Q. That's all right.

[43] (191)

What did you do?
A. We toured the city, and we studied some. We practiced.
Q. When you toured the city, how did you physically tour it? Did you walk? Did you take the bus?
A. We walked, and we drove some. We had a rental car and we drove.
Q. Who drove the car?
A. Mr. Warwick.
Q. When you were sleeping in the dorm with the other girl from the Academic Team, where were Mr. And Mrs. Warwick and grandpa staying?
A. Grandpa stayed with the boys. He stayed with the boys next-door to our guys, because there were only three in there, and there were four of our guys, so he slept with them.

And Mr. and Mrs. Warwick had a room. They had a separate hall for married coaches, and they stayed there.

Q. Was that anywhere close? Where Mr. And Mrs. Warwick were staying, how close in proximity was that to where you were staying?

A. They were in three different buildings, but the buildings were really close together.

[44] (192)

Q. Who was supervising that dormitory while you were there?

A. There were some coaches from another school sleeping on that floor with us.

Q. Did you have a curfew?

A. Yeah, I believe so.

Q. Do you remember what the curfew was?

A. I think it was either 11 or midnight.

Q. And was the curfew that you had to be back in your dormitory room by 11 or midnight?

A. Yes. Unless you were out with your sponsor.

Q. Did you go out without your sponsor in Chicago?

A. We—We did some things without our sponsor, but she knew where we were when we were doing these things.

Q. Sure. Tell me what you did without your sponsor.

A. One day—One evening, we walked into town, into Lake Forest. We walked to a store and got some ice. And then another day, some of us rode, and we went to Chicago, we went into the city, and then we came back.

* * * *

DEPOSITION OF SHEILA EVANS,
taken on behalf of the Plaintiffs, on October 25, 1999
at Tecumseh, Oklahoma.

CROSS-EXAMINATION BY MS. MEOLI:

[39] (199)

Q. Ms. Evans, you said Tecumseh has a alcohol problem. Is it your opinion that they have a drug problem as well?

A. I believe so.

Q. Have you overheard any students talking about the use of drugs in say the last five years?

A. Yes.

Q. Has it changed in any way from say the last—from the last 10 years to the last five years?

A. I believe it has. As well as being a teacher and a parent and my two children are both in [40] (200) college now, sophomore and senior and they've gone to the Tecumseh School system and having both a boy and a girl from a parent's point of view, you know, I've known kids of both sexes and that and it seemed like that since my son graduated in 1996 and I was class sponsor of both his class and my daughter's class, which is the class of '96 and '98. And it has seemed that there is more of a problem I noticed with kids that I knew in my daughter's class and, of course, and certainly not all kids, but the ones that—than more of a general problem than I thought it had been in my son's class in that two-year time span.

Q. Okay. Do you find them talking about it more freely now than they did before?

A. It amazes me that the kids will talk about use of marijuana quite freely in class so much that I have classes that—sometimes my Foundations for Living I classes will have freshman through seniors in there because, you know, it's an elective, any can enroll in it. You might have seniors who have not had the class, but a lot of freshman take it, too, so I have all four age levels. And particularly the upper class

who are [41] (210) seniors who will talk about it so freely that I have asked them, please, do not talk about that in my class. Whether you guys want to role models or not—especially I have a lot of 9th grade girls and the guys who will talk about it and if they're a role model and they hear that stuff I don't want them to hear it in my class, talk about it someplace else if you must but, you know, I don't want that talked about here.

Q. Okay. Can you sit here right now and tell us those students that were talking whether they wanted to compete in the FHA or if they were in just in your extra-curricular classes?

A. I have never heard a student that was going to compete talk about it.

Q. Okay.

A. The ones that I have heard talk about it and, you know, I can picture kids, of course, you know, with no names but are basically kids that I don't think would have had any desire to compete, maybe some of them you will, you know, will but I don't see and they have never expressed a desire to me.

* * * *

DEPOSITION OF DANNY STERLING,
taken on behalf of the Plaintiffs, on October 26, 1999,
at Tecumseh, Oklahoma.

DIRECT EXAMINATION BY MR. BOYD:

[24] (691)

A. Both. They have the opportunity to listen to motivational speakers. They get to sit in on the business sessions that the students—they're conducted by the delegates, obviously. And then there is also leadership work shops that they are attending. Some of the students are competing in some activities there because that's kind of like

the state finals and some of the, you know, the various divisions.

Q. Okay. Go on to the next activity then, please.

A. Okay. We have monthly FFA meetings where the students come, you know, they discuss various types of activities they're planning for the month. And, you know, if the students attend that meeting they get extra credit. We sell sausage, you know, for a fund-raiser. For being involved in that, you know, they get extra credit because we are a non-profit organization; therefore, you know, we're self-financed. Oh, let's see. The speech contest, you know, if they compete in a speech contest they get extra credit.

[25] (692)

Q. This is a contest with other schools?

A. Yes, sir.

* * * *

[27] (693)

Q. Let me ask you this. When the student is doing hands-on work with an animal as part of the project, it could be a very young animal or it could be a fully mature animal; is that right?

A. Yes.

Q. And that would include a large full-size steer, for instance, that the student could be handling?

A. Yes.

* * * *

[31] (697)

Q. So, for instance, the student you mentioned who is doing the floriculture culture competition or the national FFA that you are about to go to, if she were still a student and did not take the drug test she could not do that, right?

A. Right.

Q. Okay. Couldn't even do an essay competition?

[32] (698)

A. That contest is not structured that way.
Q. Are there any contest that involve essay writing?
A. Competitive contests?
Q. Uh-huh.
A. Most of the contests that deal with an essay in the FFA the final result is to give a speech, you know, from that essay or using that essay. So as far as that part of it, again, we're talking FFA activities. We're not talking class because, you know, they can right an essay in class and do not have to give it—in fact, we just finished that. They do not have to give it in a speech in an FFA contest.
Q. Okay. But there are certain contests that involve essay writing and speeches both sort of linked together; is that right?
A. No. Really it's just the speech itself. Of course, the speech is based on, you know, the initial draft essay or whatever you want to call it.
Q. Okay. And that sort of contest is also something a student who did not do the drug test would be prevented from doing; is that right?
A. That's correct.

* * * *

[42] (703)

Is there anything about FFA activities or competitions that would become especially more dangerous if a student were impaired by drugs?
A. Handling livestock, simply having a 1200-pound steer, which is a pretty normal size of some of the animals we show. If a student certainly was not, you know, 100 percent intact to what was—in tune with what was going on, excuse me, that could certainly have an effect on, yes. As far as some of the activities that we are involved with, in the FFA we have to, you know, we have to stay overnight there at the national FFA convention, for example.

[43] (704)

Is it your understanding that a student would be free to go on an overnight FFA trip without taking the drug test just so they did not do the competition?
A. Right. Yes.

* * * *

[57] (712)

Q. What was the basis for your suspecting that the student might be involved with drugs?
A. Listlessness in the class, attitude. One situation I actually smelt the aroma of pot.
Q. Okay. Do you know whether any of those students were ultimately disciplined?
A. No, I don't.

[58] (713)

Q. Okay. Do you think the students in FFA are more or less likely than the sort of general student population to use drugs, illegal drugs?
A. Less.

CROSS-EXAMINATION BY MS. MEOLI:

[71] (718)

Q. Okay. When they are competing in welding are you permitted to have one-on-one supervision of those students?
A. No, ma'am.
Q. Are you allowed anywhere near those students?
A. No. It's a contest site.
Q. Does that differ in any way from when those students are welding in the classroom?
A. Yes, ma'am. We're there in the classroom with them obviously to, you know. Yes, it does.
Q. And why are you supervising those children while they are welding in the classroom?

A. Several reasons. One, the big one, of course, the safety standpoint from the standpoint of watching over them and also grade them on their progress and their end product.

* * * *

[78] (204)

Q. When you responded to Mr. Boyd on these students that you suspected of drugs that you talked to the principal about, were there other students in your classes that—and I'll give the same five years just to try to make it a little easier—that you have suspected of being on drugs or a drug user that you have not talked to the principal about?

A. Yes.

Q. I hate to ask you for an estimate, but would it be—well, first of all, can you give me an approximation of how many?

A. Per year, would that work?

Q. Sure. Sure. Let's say per year.

A. I would say within a year's time I would estimate at least 10 a year.

Q. Okay. How about the—let me take you back prior to the implementation of the drug policy in say October of 1998. Prior to that time had you heard students in your class openly talking about the use of drugs?

A. Would it be fair to ask you if that's drugs and alcohol?

Q. Sure.

A. Yes.

[79] (205)

Q. Okay. Have you heard them talk about Drugs—well, let me limit it to drugs for the time being?

A. Yes.

Q. Okay. Did they—did you sense any kind of a fear or hiding that conversation from you?

A. No.

Q. Did they try and have you enter into the conversations?

A. No.

Q. Did they stop when you walked by?

A. I was sitting at my desk in all those situations basically so, no.

Q. You just overheard?

A. Yes, ma'am.

Q. Would you consider that happening on a frequent basis, an occasional basis, an infrequent basis?

A. Occasional.

* * * *

DEPOSITION OF DANIEL JAMES,
taken on behalf of the Defendants, on September 25, 1999,
at Oklahoma City, Oklahoma.

DIRECT EXAMINATION BY MS. MEOLI:

[27] (1043)

Q. Before I go further, let me go back a second. Has anyone in your immediate family, and I am including your mom, your mom's current husband, your dad, your dad's current wife, or any siblings, ever been arrested for any drug-related or alcohol-related charges?

MR. BOYD: Objection on just clarity. When you say "siblings," do you include half siblings and step-siblings?

MS. MEOLI: Yes. Yes.

THE WITNESS: That I know of for sure, my mother's husband, Ray Hagar.

BY MS. MEOLI:

Q. Do you know what he was arrested for?

A. Yeah. Not the specifics of it.

Q. Was it drug-related?

A. Yes.

Q. Do you know when that happened?

A. Two years ago.

Q. And your mom and Mr. Hagar have been married since April of 1999?

A. Yes.

Q. Has Mr. Hagar lived with your mom prior to that time?

A. Yes.

* * * *

[124] (936)

Q. Why don't you tell me about your knowledge of—You talked a little about the kids that you know that are using drugs that still—that talk to you. What is your knowledge about the kids that you don't know personally? Do you have any knowledge about drug use in Tecumseh?

A. Drug use about the students in Tecumseh?

Q. Yes.

A. Only just the ones that, you know, I talk to. Everybody else, I have absolutely no knowledge of.

Q. About how many kids have you talked to about drug use?

A. About drug use in general, or their?

Q. How about their drug use?

A. Probably around 12.

Q. Do you talk to them about it in school?

A. Yes.

Q. And what kind of things do they tell you about their drug use?

[125] (937)

A. Some of those are my friends, and they'll tell me, you know—just, you know, what they did that weekend, what drugs, or drug, you know, usage they had, and no real specifics or, you know, no great detail of what went on. And they'll talk about how they can't do this because they're going to go out and they're going to do this with their friends,

or that with their friends. You know, I'll go, What are you doing? Oh, we're going to get out and get high. And other people, like I think the—I think like maybe of those 12, like six of them are my friends. The rest of them are just, I mean, acquaintances that I see and I wave at. They're not really my friends, but they just talk to me about they need help with this problem, or this person in their life, you know, and they don't know how to handle it. And they'll come to me for advice. I mean—And they'll talk about their drug use, their past drug use, and they'll want advice on how to help themselves or other people.

* * * *

[218] (200)

Q. Okay. You said you knew that this boy named Jeremy went to drug rehab

A. Yes. To the best of my knowledge, he did.

Q. How many kids in the last year and a half to your knowledge have gone to drug rehab from Tecumseh?

A. Two.

* * * *

[234] (219)

Q. You also talked earlier about having been to two or three parties when students have shown up high, apparently under the influence of drugs. Do you remember testifying that way?

A. Yes.

Q. How many students showed up at these parties seeming to be under the influence of drugs? How many students, in total, are you talking about here?

A. I've physically seen about 12 people, altogether, that attend Tecumseh High School, under the influence of illegal drugs.

Q. Do you remember talking about people who hang out in the park that is to the south of the high school, and that they are the dropouts, the skater, grunge types, and people—

well, the skater, grunge types who come from, as you put it, a lower financial class? You remember talking about that?

A. Yes.

Q. Now, these people who hang out in that park, are they the people who do extracurricular activities?

A. None of them.

* * * *

[237] (220)

Q. Okay. You also talked about people you know, who talk about of this own drug use. And you made a distinction between friends and acquaintances. You have about six friends who have talked about their own drug use, about six acquaintances who have talked about their own drug use. Of all of these people, of all of the students you know who claim to have used drugs, do any of them participate in any form of extracurricular activities, other than that one student who is in the art club?

A. Some of them participate in HOPE, if you call that an extracurricular activity. I'm not sure. A good five or six of them are. Other than that, I don't think so.

* * * *

[269] (221)

Q. Okay. Let's try this again, Daniel. Let's try this again. Who hangs out at the park, Daniel?

A. Lots of people.

Q. Okay. Do you know the kids that hang out at the park that do drugs, and the kids that hang out at the park that don't do drugs?

A. I know the kids that hang out at the park that do drugs. If there are kids that hang out at the park that don't do drugs, I don't know.

DEPOSITION OF CAROLYN DAUGHERTY,
on September 22, 1999, at Norman, Oklahoma.

DIRECT EXAMINATION BY MR. BOYD:

[9] (272)

Q. Would you say that half of the class time is spent preparing for performances?

A. That would be about right.

Q. That would be about right?

[10] (273)

A. Uh-huh.

Q. About half of the time? Do you think it's more than half the time?

A. On occasion. Not every day.

Q. Okay. And overall would you say it's around half or more than half the time is spent preparing for performances?

A. Probably not every day, not half all the time or a good portion of the time.

Q. Okay. So it does vary day to day?

A. Yes, uh-huh.

* * * *

[44] (286)

Have you ever caught a choir member with illegal drugs?

A. I have never caught a chair member, no.

Q. Do you know of any use of illegal drugs by choir members?

A. I have suspected that there have been some, yes.

Q. Well, let's take it one step at a time.

[45] (287)

Have you ever known of any choir members who have used drugs?

A. I have had students tell me so and so, yes, just from what I have heard from another student tell me.

Q. Well, it sounds like you have had suspicions from time to time of choir members using illegal drugs; is that right?

A. Yes, uh-huh.

Q. Tell me the ways in which you—no, let me put that differently. Tell me the reasons that you became suspicious in the past of a particular choir member using drugs.

A. Appearance wise their eyes looked dilated. They looked spaced out, just not right, that type of thing.

Q. What is your basis for thinking those sorts of things might indicate drug use?

A. It has been through workshops that we've had through school that we've had signs to look for in students who we might think they might be using drugs. And some of those signs appeared to me that I felt there might be that problem with that student.

[46] (288)

Q. What are you supposed to do when you suspect a student has used drugs?

A. Refer to the office, the counselor or the principal, speak to them, tell them your concerns.

Q. And how do you know that's what you're supposed to do? Is it written in the policy or did somebody tell you?

A. That I don't know.

Q. Okay.

A. That's what I do.

Q. Okay.

A. Okay. I don't really know.

Q. So you don't know if that's school policy—

A. I don't know.

Q. —that's just what you do?

A. Right.

Q. Okay. We need to try again to not talk at the same time, sorry. It's okay. I do it, too. So let me ask that again.

You don't know whether it's school policy or just your own policy to refer suspected drug using students?

A. Correct.

Q. Have you, in fact, referred or given the [47] (289) names of students who you think are using drugs, have you given those names to somebody at the school?

A. Yes, I have, one that I can recall.

* * * *

[51] (291)

Q. So you think that national trend holds true at Tecumseh High School that what's called the troublemakers tend not to join choir?

A. They tend not to.

Q. The students who use drugs tend not to join the choir?

A. I suppose. I would like to believe that.

Q. Do you know about the Tecumseh High School's surveys on drug use?

A. No. I am not aware of those.

Q. Well, there is one that says that less than 5 percent of the students have tried marijuana and a resounding 85 percent say they have never tried illegal drugs. These are documents the school provided to me. Do you think those statistics are true for the choir members?

A. Yes.

* * * *

[58] (298)

Q. So students engage in attempts to enhance their performance by consuming lemon juice?

A. Right.

Q. But no other substances?

A. No.

Q. Is there anything about being in the choir or the associated activities that is dangerous, in your view?

A. I don't think so. Not in my opinion, no.

* * * *

[63] (302)

Q. What are you supposed to do when you suspect a student has used drugs?

A. Refer to the office, the counselor or the principal, speak to them, tell them your concerns.

Q. And how do you know that's what you're supposed to do? Is it written in the policy or did somebody tell you?

A. That I don't know.

Q. Okay.

A. That's what I do.

Q. Well, it sounds like you're also saying that most of your students maybe even, you know, almost all of your students they're just not going to be involved in drugs anyway, is that part of what you're saying?

A. In my opinion, I think most of them are not, but even one is too many.

Q. Oh, absolutely. But I'm just trying to get a sense of the choir students as compared to rest of the high school.

A. In my opinion. We have won academic achievement awards as a choir for the state. And you're going to find that a lot of those students don't take drugs, but some do. They may be [64] (303) intelligent but not smart.

Q. Again, trying to just get the difference between the choir students though and the students as a whole the choir students use drugs less. I just wanted to clear.

A. In my opinion, I think they do.

Q. Okay. I hear you telling me there's a whole diversity among the different kinds of students that you get in the choir, people are there for different reasons.

But is there kind of a stereotype in the way that it, you know, people talk about there are jocks and there are other people. Is there a stereotype that you think is sort of associated with the choir? I'm talking about among the students is there a stereotype associated with the students?

A. All students at Tecumseh or any students?

Q. I'm taking about at Tecumseh High School is there a stereotype about the choir students?

A. Probably.

Q. What would that be?

A. You would probably have a group of students say that they were the nerds, you would [65] (304) probably have a group of students say that they respect what they do. I would like to think that was more the case and I think it is for the most part.

Q. And who would be the sort of the cool students, the ones that everybody, you know, wants to imitate?

A. To be like.

Q. To be like, yeah. Who would be the cool students that everybody wants to imitate?

A. Well, I would like to say the choir students, but I really think it's probably the jocks.

* * * *

[80] (307)

Q. Okay. When you did get the form from the student did you check and make sure they had filled it out properly?

A. I would check to make sure the parents' signature was on it and the student's and any medical information on that back page.

Q. So it's a two-page form?

A. If they had a medical —

Q. Or just front and back?

A. Two page, (indicating).

Q. Okay. So when you got the form you didn't sign the form right away. When you got the form what did you do with it?

A. I would put it in a folder and put the money in the folder. I would have class and then after when I had the free time, my planning, I would [81] (308) write receipts on the money, and then I would look at the form and wait until the deadline, collect them, and then take them all at once at the deadline.

Q. So they all just stayed there in that folder?

A. Yes.

Q. Until the deadline came?

A. Yes.

Q. So all the forms, all the money?

A. No. The money I would turn in on a daily basis. We couldn't keep the money, but the forms stayed with me.

Q. Now do you remember did the forms—you said there was a two-page form. Was it a Xerox that was on the front and back of one page or was it two separate pages?

A. Two separate pages.

Q. Okay.

A. We didn't have to turn in both pages. You only had to turn in the one that was the permission from the parents with the signature. The second page dealt with if you were on any medication—

Q. Oh.

[82] (309)

A. —that might turn up during the testing, prescription drugs or over-the-counter things, you had to list those.

Q. I see. So those forms all went into your folder?

A. Yes.

Q. And the money all went to a safe place?

A. Yes.

Q. And where did the folder—where did you leave the folder?

A. For the most part it stayed in my office. I have my room and then an office off of the room.

Q. Uh-huh.

A. On occasion it might have stayed out on a table inside the big room where the choir room part is, on occasion but not opened but there on that table. It's possible throughout the day.

Q. This is a manila folder?

A. Yes.

Q. Just sort of a basic folder that you can open and shut?

A. A file folder, uh-huh. It's possible I put it in one of those envelopes, manila envelopes.

Q. Uh-huh.

[83] (310)

A. I know I did this year. I can't recall if it was a manila folder or an envelope last year.

Q. Okay. But the forms—since you were collecting the forms sort of day by day you needed to be able to open and close and put more forms in?

A. Yes.

Q. So you did not seal this, right?

A. Correct.

Q. Okay. Would it have been possible if there were some, you know, reason if somebody wanted to that somebody might have been able to look into that folder when you left it out on the table?

A. It's possible, yes.

Q. Okay. Because since it didn't have the money in it you didn't treat it as a secure thing?

A. Because I took the money and the form at the same time.

Q. Uh-huh.

A. I often stapled the money to the form.

Q. Uh-huh.

A. Then put the form in the folder. At the end when I was through collecting it for that class period because it had money I would put it in my office and then shut the door. I won't say that it's not possible that [84] (311) sometime throughout the day I left it out on that table, but I tried to be very careful that I didn't because of money.

Q. Okay. I understand. And I just want to—I may be a little bit thick headed here, but I want to make sure I understand this. The folder had in it, you know, money maybe temporarily, but for the most part the money was

taken out, but the folder did have in it the form page 1 which every student had to do and for the students who handed in a page 2 that had the prescription medicine information, that was also in these folders?

A. Yes.

Q. And remained in the folders until you turned it in?

A. Yes.

Q. Were the prescription medicine forms put into any kind of special, you know, container or an envelope or anything like that?

A. The folder.

Q. Just the folder itself?

A. Uh-huh.

Q. And you were able to actually read the prescription medication forms yourself, right?

[85] (312)

A. Yes.

Q. Did you read them?

A. Sometimes. It depended on how many people were handing to me at one time. I didn't stop and go, (indicating), you know. I often have to know medically when kids go with me to different places, I have to know. And so I would even know even before this drug testing thing because I would have a form filled out by their parents already. When I take them places I have to know if they're on any kind of medication for whatever reason for safety purposes for them.

* * * *

[93] (1062)

Whenever I go on an overnight trip I do another form that says—that even gets into further detail asking insurance company, Social Security number of the student, parental emergency contact and list any prescription drugs that they are on.

Q. Do you do that for every trip?

A. Every trip overnight.

Q. So if they go on three overnight trips they have to fill out that form three times?

A. Correct.

Q. Okay.

A. It might change.

Q. Sure, exactly.

Did you ever talk with school officials about whether your overnight trip form was something that was necessary or appropriate?

A. That's something I did on my own because I ended up in the emergency room one time with a student and I had the form, and the emergency room [94] (1063) people said this is wonderful. I wish every person would do this.

* * * *

[108] (323)

Q. And obviously for a soloist you absolutely count on that student to show up at the performance and perform if they are going to play a solo role?

A. Yes.

Q. Okay. This is what I'm trying to get at. If you have a student who you know is not going to be in the performance for whatever reason, and you're doing rehearsals during class, that student, the student who can't do the performance, is not going to get one of those critical roles, right?

A. Right.

Q. Okay. Are there any special awards that are given to talented Tecumseh singers or honor?

A. By me?

Q. Within the school. I'm not talking about all state or any of that. But I mean, within the school itself, are there any awards given for, you know, the more talented singers?

A. Over the last two years I have not given any awards. There have been some in the past.

Q. What are the awards?

A. Outstanding freshman, outstanding sophomore, outstanding junior, and so forth. Solo performance awards, ensemble performance awards; [109] (324) outstanding musician overall.

Q. Okay. But being really realistic here, a student who isn't going to do any of the competitions or performances outside of school, would that student have any shot of getting one of those outstanding student awards?

A. No.

* * * *

[146] (338)

Q. When college recruiters are looking for talented students, generally they go to the competitions, right?

A. Sometimes, yes.

[147] (339)

Q. I mean, to be fair, that's the main place that you could identify a talented vocal student would be to go to the competitions?

A. I would see how that would be the better place because you could hear them one on one. The only time I ever recall a college that came that wasn't already—they weren't hosting the competition, was maybe at state competition. There might be some college professors that would come then.

Q. Uh-huh.

A. In my experience I've had them call me and ask may I come to your class.

Q. Sure. But they wouldn't need to call you to go to a competition?

A. No.

Q. And certainly when the colleges host the competitions they have an opportunity to observe the students sing and look for students who they might be interested in applying for that college, right?

A. Yes, uh-huh.

Q. In fact, I imagine that's one of the reasons they host these competitions, isn't it?

A. Oftentimes, yes.

* * * *

DEPOSITION OF DANNY JACOBS,
taken on behalf of the Plaintiffs, on September 23, 1999,
at Norman, Oklahoma

DIRECT EXAMINATION BY MR. BOYD:

[16] (350)

Q. Is that a man or woman, Terry?

A. That's a man.

Q. Did Mr. O'Rorke—I'm sorry, is Mr. O'Rorke a member of the school board?

A. Not at that time.

Q. So he brought up this issue in February of '98 just as a parent who was attending the meeting?

A. Yes.

Q. And was that the first time that you personally were involved in a discussion of drug testing at Tecumseh High School?

A. I wasn't in a discussion.

Q. Was that the first time you heard anyone talk about drug testing since you arrived at Tecumseh?

A. Yes.

Q. Tell me what Mr. O'Rorke said during that February 1998 school board meeting.

A. He was an incoming board member who stood up and addressed the fact that the drug issue was his number one priority, number one concern.

Q. Had you ever had a conversation with Mr. O'Rorke prior to that meeting?

BY MS. MEOLI: Can you be more

* * * *

[31] (351)

A. No.

Q. Okay.

A. I'm just trying to make sure I explained that where it was understandable.

Q. I think I do understand it now. Thank you. I just wanted to make sure I wasn't cutting you off. So this final list that you ended up proposing to them was based on a series of discussions with the board. Did those discussions also mention some other activities that it didn't make the final list?

A. Okay. Yes.

Q. Which other activities were mentioned in discussions with the board?

A. Well, let's see, in the August 31—I think it was August 31, '98, there was a board meeting that was a community board meeting and there were, let's see, there was—there were requests, you know, by others that they wanted to be a part of that policy.

Q. Requests by others, what do you mean?

A. There was a board meeting on August 31 that was a community board meeting and that was to share the policy and, you know, to get information and feedback and what not.

[32] (352)

And this would have been following—at the end of that board meeting there were sponsors who wanted to place one of their activities to be a part of the policy.

Q. These are staff members of the schools who are sponsors of extra-curricular activities?

A. Yes.

Q. Can you —

A. Staff and not staff.

Q. Okay. But these are sponsors of the school extra-curricular activities who were proposing that their activities also be subject to the drug testing; is that right?

A. In one that requested it it was not actually a school activity.

Q. Which is that?

A. Life guides.

Q. Okay. But the others—what are the others that requested to be included in the policy?

A. The one I can remember for sure that requested was the Beta club.

Q. Okay. Who is the Beta club sponsor?

A. Cindy Hale.

Q. And she herself said that she wanted to have drug testing of Beta club members?

[33] (353)

A. Yes.

Q. Who is the life guide sponsor?

A. Well, he's not a sponsor as per se for us, but he has the life guides program and that's Kent Scott.

Q. And Mr. Scott spoke at the August 31, 1998, board meeting and he requested that drug testing apply to life guides?

A. At the end of that board meeting he asked if it that could be.

Q. Were there other people who specifically asked for life guides to be tested or it was just Mr. Scott who requested that?

A. Just Mr. Scott.

Q. Okay. And I've actually seen those minutes and some correspondence that you had following that meeting and it sounds like somebody said, hey, can't we just test all the students? Wasn't that something that some people proposed?

A. Yes. Some people wanted to test all the students, yes.

Q. Did that come from the board or from the members of the public?

A. That request was from someone in the audience, members of the public.

* * * *

[45] (354)

Q. So you wrote the student athletic drug testing policy draft and you presented it to the board?

A. Yes.

Q. You follow the directions of the board, right?

A. Yes.

Q. When the boards tells you to do something you do it, that's your job?

A. Yes.

Q. So if you wrote a student athletes only drug testing policy it must be because they told you to do it?

A. Yes.

[46] (355) board meeting. And I want you to focus on this next sentence. The decision at this meeting was to put into action a policy involving extra-curricular activities as opposed to a policy relating only to athletes. Now I understand that to mean that there was under consideration a policy relating only to athletes, but on August 3rd at the board meeting a decision was made to expand it to include non-athletes. Is that what that means?

A. (reading). That's what that one means, yes.

Q. Okay. And is that accurate? Is that what happened?

A. Yes.

Q. Okay. Now, I want you to think back to that August 3rd board meeting where they decided to go from athletes only to non-athletes. Who first suggested that the policy be expanded to include non-athletes?

A. Dean Rogers, who—oh, pardon me, president of the board, who addressed the FFA issue.

Q. Tell me what she said to the extent you can remember it.

* * * *

[47] (356)

A. She believed or felt that that organization should be a part of it because they were an extra-curricular activity that was involved in competing.

Q. And when she made that observation that FFA does competitions and that they ought to be drug tested, how did the other people respond to that?

A. Positive.

Q. Do you remember what any particular person said?

A. No.

Q. Did you give any reaction to it?

A. I don't know.

Q. Now in that meeting it sounds like you started out with FFA. Did people then add suggestions for other activities that should also be drug tested?

A. There was other discussion, yes.

Q. Okay. So people discussed other candidates for drug testing, I guess that's what you're saying, right?

A. The people on the board discussed other activities.

Q. Okay. Did members of the public other than the board also make contributions at that

* * * *

[49] (357)

The non-athletic activities that ended up being including in the August 31 draft of the policy, were those all suggested at the August 3 board meeting?

A. Yes.

Q. Were they proposed by board members only or did you propose some of them?

A. The board members.

* * * *

[75] (361)

Q. And would you say that the drug testing program also demonstrates the school's commitment to oppose drug abuse?

A. Yes.

[76] (362)

Q. Before you enacted—well, before the school enacted this drug testing policy, can you recall as you sit right here today any incidents involving illegal drugs at the school?

A. Yes.

Q. Okay. Can you detail those incidents to me? Tell me everything you remember about every one of those incidents.

A. I remember that there were two in February '98, that a drug dog found a—I think it was a small bag of marijuana in the parking lot by a curb or a pole or something in the lot. And then the drug dog hit on a car that contained marijuana.

Q. This hitting on the car was a separate incident from the first incident that you described?

A. Yes.

Q. Can you recall any other incidents involving illegal drugs?

A. No.

Q. Let's talk about the first one. The drug dog found a bag in a parking lot next to a curb or next to a pole, a bag of marijuana. Was that bag ever found to belong to any particular student?

A. I don't know.

Q. Well, if a student was disciplined would [77] (363) you know about it?

A. Not necessarily.

Q. Would a student—how severe would the punishment be for possessing a bag of marijuana? What would the consequences be under school policy for a student?

A. I don't know.

Q. Okay. Is the parking lot fenced off?

A. No.

Q. Is there anything that would prevent a member of the public from walking through that parking lot?

A. No.

Q. Do people who are not students walk through the parking lot from time to time?

A. I don't know.

* * * *

[103] (367)

Q. What are the drugs that are screened for in Tecumseh's drug test?

A. On the six panel screen that would be amphetamines and barbiturates, opiates, marijuana, and then that benzodiazepines and don't ask me to spell that one. There's one I left off.

Q. Does it include steroids?

A. No.

Q. And what we're talking about here is the drug test that is done initially at the beginning of the year for all students that are covered by the policy as well as the random drug tests that are done throughout the year; is that correct?

A. Yes.

Q. But obviously if you do for cause testing, in other words, if you do testing for a student who you suspect of using a particular drug then you might including another drug, for instance, steroids; is that right?

A. Steroids would be tested under reasonable suspicion and then that would be included at that time, yes.

Q. Okay. Why did you not include steroids [104] (368) in the routine drug tests?

A. Because it's a $90 test to test for the steroids. And in my experiences that steroid is the most noticeable of drug use because a youngster is going to change body size and behavior in like a four-to-six week period. I mean, it's a substantial difference in a youngster, and at that time it would be a reasonable suspension.

Q. So you're aware of students who have used steroids? You've seen that happen?

A. Yes.

Q. Are you aware of students ever using cocaine?

A. No.

Q. Are you aware of students ever using opiates?

A. No.

Q. Are you aware of students ever using benzodiazepines?

A. No.

Q. Are you aware of students ever using any of the drugs that are included in the six panel screening?

A. Yes.

Q. Which are those drugs?

* * * *

[107] (369)

Q. Okay. So I want to know whether you know what the window of detection is for each of the different drugs that are being screened for under the drug test?

A. I know one.

Q. Which one?

A. Marijuana.

Q. And what is the window of detection for that?

A. Up to 60 days.

Q. Do you have any idea what the window of detection is for the other drugs?

A. No.

Q. The drug screen does not—the drug test that the school uses does not screen for alcohol either, does it?

A. No.

Q. Why not?

A. Because basically the window was [108] (370) extremely limited and that it would fall under the policy of reasonable suspicion.

Q. In other words, you will test a student for alcohol if you suspect the student is under the influence of alcohol at that time?

A. Yes.

Q. But once the student is no longer under the influence of alcohol the problem that you have identified is that the drug test wouldn't detect the alcohol any more; is that right?

A. Tell me that again.

Q. Okay. Let me give you an example. If the student drinks some alcohol on a Saturday night and he comes in and he does the drug test on a Monday morning, that alcohol is not going to show up; is that right?

A. Yes.

Q. So there's not really much point in doing the screen for alcohol because it's only going to pick up students who are at the moment of the drug test actually under the influence of alcohol; is that right?

A. Within that window of time that is for alcohol.

Q. What's the window of time?

[109] (371)

A. As I said, I don't know.

Q. But it's pretty short?

A. Yes.

Q. Okay. The drug test doesn't screen for nicotine either, does it?

A. No.

Q. Or for tobacco?

A. (shakes head). No. I'm sorry.

Q. That's okay. Why not?

A. Why not? The part of the six panel screen was for just those drugs that I tried to remember the list for you.

Q. So this package of the six panel screen was offered to you by the DATL, by the lab?

A. Yes.

Q. Did they say that they could test for nicotine or tobacco?

A. No.

Q. Did you ask them about it?

A. No.

Q. Did the subject ever come up in any conversation that you have had with anyone until today?

A. No.

Q. The school board never discussed whether

[110] (372)

Q. Is it legal for a minor to possess or consume tobacco products in Oklahoma?

A. No.

Q. Is it harmful for a youngster to consume tobacco?

A. Yes.

Q. Why?

A. Because it's an addiction and then also cancer causing.

Q. So tobacco can potentially kill you?

A. It's possible.

* * * *

[119] (379)

Q. So is it your understanding that the school requires evidence of immunizations for its students rather than actually performing the immunizations itself; is that right?

A. Yes.

Q. So a student is free to go to a private physician and get their shots and bring an appropriate document from the doctor and to show that they have had the shots. Is that how it works?

A. Yes.

Q. Now athletes have to have a physical exam; isn't that right?

A. Yes.

Q. That's a safety requirement?

A. Yes.

Q. If you're not an athlete—let me rephrase that. Students who do not do athletics do not have to have a physical exam, do they?

A. Correct.

Q. For the non-athletes is there any medical requirement other than immunizations?

A. No.

Q. Athletes also use locker rooms to get [120] (380) undressed and dressed; isn't that right?

A. Yes.

Q. And they shower in the locker rooms as well, don't they?

A. Yes.

Q. That's true for all the team sports that the students might engage in, the athletic team sports?

A. Not all.

Q. Which ones would not involve showering or undressing?

A. Okay. Pardon me. You mean the undressing parts?

Q. Yes.

A. That would be all.

Q. Okay.

A. I was addressing the showering.

Q. Which team sports would not involve showering?

A. Some may choose not to. Can I clarify that. For instance, if you get on a bus and go to a track meet and you come home in the night or, you know, those kids go home as opposed to the shower.

[121] (381)

Q. Do they practice at school?

A. Yes.

Q. The track team? And they would shower after practice, right?

A. Possibly.

Q. Okay. Now I want you to have in mind the extra-curricular activities that are listed in the Tecumseh policy that are not athletic, okay? Do you have those in mind?

A. Okay.

Q. Do any of those activities require the participants to ever take a shower together?

A. No.

Q. Do the participants in any of those activities ever get fully undressed in front of other students as part of their activity?

A. Yes.

Q. Please give me every example you can think of in which that has occurred.

A. Well, okay. You know, there's a deal at Enid, Oklahoma. It's called Tri-State, for instance, and that's a band I think, still a vocal deal, and the kids they'll go there for competition. And those kids will, say, stay in the Salvage Army building or they will stay in sleeping

* * * *

[124] (382) facility?

A. Even the women athletes have access to private shower facilities, you know, so in a motel room they would. I don't know about some of the places that they would go. Like that Tri-State thing at Enid, I don't know how that's set up or arranged.

Q. Okay. But to your knowledge though is there any example of students who travel for non-athletic extra-curricular activities not having access to private toilet facilities?

A. No.

Q. And is there any instance that you're aware of in which— no, forget it. I'm not going to ask that.

Okay. Other than traveling and having to share overnight accommodations, can you think of any other instance in which non-athletic extra-curricular students are required to completely disrobe in front of other students?

A. No.

* * * *

[126] (384)

Q. But there are some special dangers that apply when you're doing athletics, is that also something that you would agree with?

A. There are some dangers other than the violent behavior, yes.

Q. No. My question is aside from those dangers that would apply to everybody in the general population, are there some particular dangers that apply in the context of doing the athletic [127] (385) activities?

A. Yes.

Q. Tell me about those, please. What are those dangers?

A. It's just like the example I just gave you. If you're going to have to deliver a blow or receive a blow you have to be ready to position yourself, you know, to handle yourself in a particular situation under those—and be able to react immediately or instinctively.

Q. Do students of the choir ever face a situation like that where they have to be delivering a blow or receiving a blow?

A. Not unless they encounter violent behavior.

Q. But there's nothing about choir that involves that sort of activity?

A. Nothing about delivering or receiving a blow.

Q. Is there anything about the band that involves delivering or receiving blows?

A. No.

Q. Is there anything about the FFA or FHA or the academics team that involve delivering or receiving blows?

[128] (386)

A. No.

Q. So for the non-athletic activities that are subject to the drug test policy, students are never involved in delivering or

receiving blows in the way that the athletes are that you described; is that correct?

A. Yes.

* * * *

[140] (387)

Q. Okay. Who does the physical exams of the athletes?

A. It's my understanding there were M.D.'s and nurses available and they do it on a set night, and then some youngsters go to their family physician. And whatever the case the physical must be taken on a OSSAA form and that is the Oklahoma Secondary Schools Activities Association. Everyone has the same form so everything is done, you know.

Q. So these medical personnel, they come to the actual school facility and do the examinations [141] (388) there in the school?

A. Yes. The high school was done by medical personnel, and if I remember correctly the middle school was done through the cooperation of Shawnee Mission Hospital.

Q. Okay. Does the physical examine involve taking any body fluids, blood, urine, saliva, anything like that?

A. Not unless their findings would dictate that, no.

Q. What do you mean, their findings?

A. When you're talking the physical if, you know, if they find a child with a hernia or a child with a lump. I mean, that youngster would be referred for other—you know, for other testing naturally, you know, through the parent.

Q. Okay. But the initial testing doesn't involve taking any bodily fluids?

A. No.

Q. What does it involve?

A. Okay. I haven't done that in a long time. But, you know, they do their height and
weight, you know, they check the eyes, ears, nose and throat, their pulse and I know they listen to their heart.

[142] (389)

I know they check them for hernias. They ask for any prior medical condition. That's to the best of my knowledge what I can remember is on form.

Q. Describe to me how you check somebody for a hernia.

BY MS. MEOLI: Are you talking about him generally, Mr. Boyd, or the Tecumseh School District in general?

BY MR. BOYD:

Q. Based on your experience at Tecumseh or elsewhere with the filling of requirements of the OSSAA for athletes, including the requirement that a hernia evaluation be performed, I'm asking you to describe how the hernia check is done.

A. You've got to remember that I told you I'm trying to remember that form the best it was and a hernia check is done by an M.D.

Q. Do you know how an M.D. does it?

A. He puts a glove on.

Q. Describe it.

A. I don't know where you're going.

Q. How do you do a hernia check?

A. The guy puts a glove on and he checks you.

[143] (390)

Q. How? What does he do?

A. Well, first of all you're in there and you're disrobed and he's checking you to make sure that don't have a rupture.

Q. How does he check you?

A. Well, by putting his finger in those points where they check for hernia.

Q. Where are the points that he puts his finger? Are they in any private areas, what we call private areas?

A. Oh, yes. Down by your testicles and your penis, in that area. And I couldn't begin to tell you how they check a female.

Q. You said the students were asked to disclose their medical conditions, right, that that's one of the standard questions on the OSSAA form?

A. When I last did it. You know, they wanted to know if the youngster had had open heart surgery or if a youngster had one kidney.

* * * *

[180] (394)

Q. Okay. Who else is in the bathroom with the students when they're giving the sample?

A. The adult staff member who is assigned to be in there.

Q. And what they are doing?

A. Listening for normal sounds of urination, you know, making sure that the validity and confidentiality of that thing is in place.

Q. When you're using a sample cup what are the normal sounds of urination?

A. I don't know how to describe that to you.

Q. Is it because it's an uncomfortable question?

A. No. I'm trying to figure out how to answer that for you. I don't know how to describe it to you.

Q. The boys who are giving the urine samples, they have to urinate into these two cups which are not particularly large cups. Are they supposed to fill them both up or fill them up to a

* * * *

[182] (395) faculty sponsors are supposed to check certain aspects of the urine, right?

A. Yes.

Q. What do they check for?

A. Well, they make sure that that sample

that was in that cup was of, you know, body temperature.

Q. And how do they do that?

A. Well, you would—you can feel and tell if it would be warm or cold.

Q. So the student's teacher or coach holds the cup of urine in his or her hand and feels the temperature?

A. Yes. They would have to when they were sealing it.

Q. Do they look at it for its color or its clarity?

A. Yes.

Q. Is the student standing there watching the teacher or the coach examine their urine?

A. They seal that together.

Q. So the student is standing there?

A. Yes. They seal that together.

* * * *

[220] (408) you do not sign the drug testing form you will be excluded from the activities that take place after the normal school day or on the weekends; is that correct?

A. Yes.

Q. Okay. How many students have tested positive for the presence of drugs during the drug test administered during this school year and the last school year as part of the random program for the initial drug testing screening? Okay. 98-99 was random and they were three. 99-2000 was initial and there was one.

Q. Do you know the total number of students who were subjected to all of those different drug tests? Take your time.

A. In the 98-99 there were 243 tests.

Q. Those were all random tests of students who participated in extra-curricular activities, correct?

A. I just remember the 243.

Q. Actually I just remembered I had a letter from your lawyer that tells me this information, so I'm going to help you out and let me read you what she said and you can tell me if that's correct, okay?

[221] (409)

A. Okay.

Q. The total number of tests conducted on the students for the 1998-99 school year was 243. Prior to the abatement

of the policy on August 16, 1999, 241 drug tests were conducted for the 1999-2000 school year. Does that sound right to you?

A. Yes.

Q. Is there anything you want to add or modify?

A. Yes. The number 266 is in my mind on 99-2000.

Q. Okay. Well, you certainly have the opportunity to correct that number 241 if you need to. But let's agree that we're in the ball park of about 500 students have been drug tested during the two years.

A. Yes. (Discussion off the record)

Q. This is not to me significant whether we're talking about, you know, a difference of 10.

A. 500 is in that ball park.

Q. But what we're talking is about 500 students that have been drug tested. And so this is the pool we're talking about for which there have

* * * *

[235] (410)

Q. But that would also describe the French club or the year book or any number of other activities also, right?

A. Privilege, yes.

Q. Voluntary?

A. Yes.

Q. And these activities also involve travel, right?

A. Yes.

Q. But, again, there are many other activities that involve travel, field trips, Beta club, some of those activities also involve travel, right?

A. Yes.

* * * *

[237] (411)

Q. Is there an auto mechanics kind of class or activity at the high school?

A. No, but there is mechanics as far as welding.

Q. And there's a shop that involves wood tools, I suppose?

A. That's yes. That's part of the kids that are in the FFA program.

Q. Can you do it apart from the FAA program

* * * *

[241] (412)

A. You can harm yourself either way.

Q. All right. I understand that. And my question to you though is between these two different activities is one of them, in your opinion, more risky comparing using drugs in the marching bands and the possibility of heat exhaustion versus being under the influence of drugs and using a power saw?

BY MS. MEOLI: You can answer that question yes or no, Mr. Jacobs.

BY THE WITNESS: Yes.

BY MR. BOYD:

Q. Which of those activities is more risky?

A. A power saw.

[242] (413) characteristic shared by the non-athletic extra-curricular activities subject to drug testing is that students engage in interscholastic competitions. Why is that a reason to do drug testings on this group of students?

A. Because those youngsters are at—can be at risk at some point in time. Also, in competitions they wont be as alert.

Q. You said one of the reasons to focus drug testing on the activities with competitions is that the students could be at risk during the competitions. But, again, that would be true of a number of activities not involving competition, just like with the power saw and the chemistry lab and really anything being involved in drugs could create equal or greater risks then in these activities, wouldn't you agree?

A. That they would be greater risks than these competitions.

Q. Student's involvement with drugs when they operate power saws and when they're in chemistry labs or when they perform any number of other activities could subject them to risks that are equal to or even greater than the risks that

* * * *

[246] (414)

Q. And you were talking earlier—I mean, I could tell when you were talking earlier about the academic team and its successes, I noted some pride in your voice and that's appropriate.

A. Big time.

Q. Big time. And a lot of your other activities have done very well, too. The choir has been very successful, right?

A. Definitely.

Q. So when these teams go out into the public representing the school it's part of what they're doing of projecting an image of what the school is and what the school stands for?

A. Yes.

[247] (415)

Q. And this function of representing the school to the public, is that part of the reason that these activities are subject to drug testing, that you want to tell the public that at Tecumseh High School we project a drug-free image?

A. We do want to project a drug-free image, but we also want to give those kids an opportunity as a preventative measure to be able to say no.

* * * *

DEPOSITION OF DANNY JACOBS,
taken on behalf of the Plaintiffs on October 25, 1999,
at Norman, Oklahoma.

DIRECT EXAMINATION BY MR. BOYD:

[301] (423) which case it was?

A. Yes.

Q. I just want to make sure I understand.

A. Yes, sir.

Q. Okay. And do you remember there was some discussions at school board meetings during the period of July, August 1998 regarding the legal limits of student drug testing and the fact that the school could not drug test all of its students? Do you remember there being some conversations along those lines?

A. Yes.

Q. And when those conversations took place were you aware of this court case that allowed drug testing of the non-athlete, extra-curricular students?

A. Yes.

Q. Is a reason that this school policy applies to extra-curricular students because that was the legal limit of testing?

A. Yes.

Q. And in selecting the extra-curricular students for testing you never heard any discussion, including these school board meetings, you never heard any discussions that students participating in [302] (424) non-athletic extra-curricular activities were selected because they engaged in especially dangerous activities or because they were more likely than other students to use drugs?

A. No.

* * * *

[316] (425)

A. The policy said that there would be no academic sanction.

Q. Besides that phrase in the policy is there any other place in writing that you can point to that shows that class enrollment or a grade will be unaffected by refusing to take a drug test?

A. No.

* * * *

CROSS-EXAMINATION BY MS. MEOLI:

[350] (429) he asked you if you notified or if Mr. Gower notified anybody else and your response was they notify the patient of that child and set a meeting up. Does Mr. Gower notify any kind of a patient?

A. No.

Q. Who does Mr. Gower notify when a positive result is received by you?

A. It would be the parent.

Q. Okay. Who else is notified?

A. It would be the parents and then the sponsor or coaches of those classes that that youngster is in.

Q. Mr. Jacobs, do you know approximately how many patrons appeared at that August 31st board meeting?

A. [50] [2]. Maybe a few more than [50].

Q. And you were there during that whole board meeting?

A. Yes.

Q. Did any patron or anyone in the audience speak out against the implementation of this policy?

A. No.

Q. The board then implemented or voted on [351] (430) the policy on September the 14th, correct?

A. Yes.

Q. And the policy was implemented on what date, if you remember?

A. October 19th.

---

[2] The actual transcript of the deposition stated "15." However this was a mistranscription, and was duly modified by the witness on the errata sheet to the deposition.

Q. Does that date have any other kind of significance other than the fact that the drug test was started on that date?

A. It would have been in relation to the end of the semester, the beginning of the second one, and for us that would be a nine-week period.

Q. Okay. So students that were enrolled in the first semester, which in Tecumseh lasts nine weeks, would not have been affected whatsoever by the drug testing policy; is that correct?

A. Correct.

Q. Was it intentionally started on the first day of the second semester?

A. Yes.

Q. Let's go back to this policy for one second. I want to ask you a couple of other questions about the Oklahoma Secondary Schools Athletic Association. We have already I think stated that all of the activities that are listed under the—on

* * * *

RE-DIRECT EXAMINATION BY MR. BOYD:

[357] (431)

Q. Can you tell me again what OSSAA stands for?

A. It's the Oklahoma Secondary Schools Activities Association.

Q. Does the OSSAA require drug testing for its own eligibility rules?

A. No, sir.

Q. Can Oklahoma school students from schools without drug testing compete in OSSAA sanctioned competitions?

A. Yes.

* * * *

ART II

Prerequisite: Art I
Concepts from Art I will be reinforced such as visual elements and principles of design. More emphasis will be placed on drawing, painting, print-making, art history, graphic design, life drawing, interior design, architecture and environmental design.

ART III

Prerequisite: Art II
Concepts from Art II will be reinforced such as visual elements and principles of design. More emphasis will be placed on drawing, painting, print-making, art history, graphic design, life drawing, interior design, architecture and environmental design.

ART IV

Prerequisite: Art III
Concepts from Art III will be reinforced such as visual elements and principles of design. More emphasis will be placed on drawing, painting, print-making, art history, graphic design, life drawing, interior design, architecture and environmental design.

CERAMICS I / SCULPTURE

This is an introductory course in basic pottery skills. Students create pottery, using several hand building techniques, learn to fire the kiln, and formulate glazes and clay bodies. Art History will be incorporated into this class.

CERAMICS II / SCULPTURE

Prerequisite: Ceramics I
More emphasis is placed on individual development of design concepts and mastery of hand build pottery. A more in depth continuation in the study of art history.

CERAMICS III

Concepts of Ceramics II will be reinforced with an emphasis placed on wheel thrown pottery.

CERAMICS IV

Concepts of Ceramic III will be reinforced with an expectation of the mastery of skill and technique. Presentation and a portfolio of work will be completed.

ART HUMANITIES

This course focuses on a History of the Humanities, the visual arts, and their parallels in music and literature. Works of art from a variety of cultures are introduced in distinct historical periods, from prehistoric to the contemporary. Students will be involved in the production and criticism of art, as well as studying art's history and aesthetics.

HIGH SCHOOL CHOIR

Objective: To acquaint the students with the basic fundamentals of vocal techniques and to expose them to various kind of musical literature. Basic vocal fundamentals include rhythm, pitch, tone, color, breath control, and visual performance. Musical literature includes contest, solo ensemble, choir, sacred, poplar, classical, and musical theater. Any student grades 9-12 may enroll. Extra rehearsal time before or after school may be required periodically. Attendance at all contests, concerts, festivals, etc. is expected.

MUSIC APPRECIATION

One Semester/Block
The purpose and objective of this class is to provide an opportunity for the student to understand and appreciate the origins of popular music in America. The class will focus mainly on the development of Rock Music but also will be

exposed to Jazz and Country/Western. Students will be tested from audio and video tapes as well as notes taken from lectures during class.

SHOW CHOIR

Objective: To acquaint the students with the basic fundamentals of vocal techniques, to expose them to various kinds of musical ability and visual performance. Basic fundamentals include rhythm, pitch, tone, color, breath control, and visual performance. Musical literature includes contest, solo, ensemble, choir, sacred, popular, classical, and musical theater. Visual performance included choreography. Students, grades 9-12, who have been chosen by audition in the spring prior to the school year any enroll. Attendance at extra rehearsals, concerts, contests, festivals, etc. is required. Certain academic and moral standards are required.

CONCERT/MARCHING BAND

Prerequisite: Minimum year of previous formal training (band class or private lessons)

This course is *designed* to reinforce instrumental skills by way of practice and performance. Performance at Varsity Football and Basketball Games, contests, solo and ensembles and extra rehearsals is required. Also many city and state civic activities are attended by this group.

STAGE BAND

Prerequisite: Must be a member of the Concert/Marching Band or attain permission from the band director. This course is designed to broaden the horizons of students through the use of jazz *music*. Skills students would be exposed to include: basic music theory, improvisation, music history and improvement of basic instrumental skills. Extra Rehearsal: Public performances will be required, as the Stage Band will be a Major Public Relations force in and out of the community.

MUSIC THEORY/FUNDAMENTALS

The purpose of this course is to prepare college bound music majors or minors to function effectively in a collegiate level Music Theory course. Also, to give talented students of composition more tools with which to *work* to produce functional compositions of precise musical forms. It should provide basic music theory skills, key signature recognitions, major and relative minors, knowledge of intervals and their relationships, scales: all major and all 3 forms of minor scales.

AUXILIARY CORPS (Color Guard)

The auxiliary corps is an extension of the marching band. It includes flags and rifles. The basic fundamentals of marching, twirling, and handling the equipment and maneuvering are taught and stressed. The corps performs with the Senior Band during marching activities. After marching season, the corps performs as a separate unit. Membership is chosen by audition.

FOREIGN LANGUAGE

Some courses have prerequisites.

SPANISH I

Beginning Spanish is taught be means of a carefully balanced four-skills approach: listening, speaking, reading and writing. Spanish is learned through grammar and vocabulary, model sentences, usage note, grammar and usage explanations and reviews, reading practice and abundant oral and written exercises

SPANISH II

Prerequisite: Recommended "C" or better in Spanish Teacher approval

This is a continued approach of the four-skills: Listening, speaking, reading, and writing. More emphasis is put on constant Spanish conversation, using various tenses, as we customarily use in our native languages.

SPANISH III

Prerequisite: Recommended "A" or "8" in Spanish II

Advanced grammar will be introduced and applied to reading literature as well as oral projects. There will also be some written work involved in this level.

SPANISH IV

Prerequisite: Successful completion of Spanish III

This course is a review of grammatical structures, verb tenses and moods, composition, as well as a continuing study to improve student's skills in listening, speaking, reading, and writing. Students also will be introduced to Spanish culture and literature. This course is designed to prepare students to take advanced-standing exams for college credit.

FRENCH I

Students learn common French phrases. vocabulary, and simple sentence construction. Although students will learn to read and write the French language, primary emphasis is given to speaking and hearing the language. Some comparative studies of French-speaking and American culture and history will also be made

OKLAHOMA STATE DEPARTMENT OF EDUCATION
Gerald E. Hoeltzel, State Superintendent of Public Instruction

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APPLICATION

The Drug-Free Schools and Communities Act of 1986,
Part 2, Title V of the Augustus F. Hawkins—Robert T. Stafford
Elementary and Secondary School Amendments of 1988
(P.L. 100-297)

1989-90 School Year

Application Closing Date: September 29, 1989

Funds have been appropriated by the U.S. Congress to establish programs of drug abuse education and prevention coordinated with related community efforts and resources. The Act provides federal financial assistance to states for grants to local and intermediate educational agencies and consortia to establish, operate, and improve local programs of drug abuse prevention, early intervention, rehabilitation referral, and education in elementary and secondary schools. Completion of this application is necessary to enable an LEA or consortium of LEAs to receive funds under this act.

Complete all parts of the application and send the original to:

Oklahoma State Department of Education
Drug Education; Comprehensive Health Section
Room 2-14, Hodge Education Building
2500 North Lincoln Boulevard
Oklahoma City, Oklahoma 73105-4599

Tecumseh	I-92	Pottawatomie
District Name	District Number	County
302 S. 9th Tecumseh, OK	74873	$8,757
District Address	Zip Code	FY1989 Allocation

Charles Shields — (405) 598-3739
LEA Contact Person for Drug Education — (Area Code) Telephone Number

9-13-89 — Jim V. Myers
Date — Signature of Authorized Representative

I. *Needs Assessment*

Briefly state the e:ttent of the current drug and/or alcohol problem in the local district. Identify needs for a drug and alcohol abuse education and prevention program and describe how these needs were identified.

Current surveys from sources such as the Pottawatomie County Alternative Education Program point to a continued use and abuse of alcohol among our student population. Drugs are used but the survey indicates the percentage of users is stable, if not dropping. A comprehensive program is needed for all students in grades K-12. Said program should focus not only on prevention of drug and alcohol abuse but also many of the social problems teenagers face such as teen pregnancy, dropout, etc. These programs should be based on positive reinforcement of self image and character, and should equip the students with needed social skills with which to combat negative peer pressure.

II. *Current Policies*

A. Describe the current drug and alcohol policy including an explanation of practices and procedures used to enforce the policy.

Currently, Tecumseh Public Schools ban use of selling, buying, transmitting, or secreting any alcoholic beverage, narcotic, hallucinogenic drug, marijuana, barbituate, amphetamine, intoxicant or other prohibited substance.

All due process rights are observed. Drug dogs are used along with routine administrative checks, teacher observations to determine violators. Students will be suspended for violation of the policy. Said suspension may be to the Pottawatomie County Alternative School or regular suspension depending on the circumstances.

B. Does the policy have established practices and procedures designed to eliminate the sale and/or use of drugs and/or alcohol on school premises?

Yes

C. How does the local district convey to students the message that drug and alcohol use at school or school sponsored events is not permissible?

Besides the published policy of the Board of Education, the student handbook and the Student Rights and Responsibilities manual contain statements concerning the consequences of use of alcohol or drugs on school grounds or during school sponsored activities.

F. Indicate below if your district would be willing to participate in a state-wide survey of students. The survey would be comprised of questions on the knowledge, attitude, and behaviors concerning drug and alcohol related issues. All expenses would be incurred by the State Department of Education.

YES __X__ NO_____

G. Briefly state any significant gains that have been observed since participating in this grant. (i.e. fewer reports of DUI, less vandalism, decline in drug referrals, increases in student support groups, etc.)

Student support for drug/alcohol awareness programs has increased significantly. We have had very few at school drug/alcohol incidents the last two years. Student

organizations have been instrumental in organizing drug/alcohol free dances, Teens Openly Against Drugs, and other "Say No" projects.

VIII. *Local Advisory Council*

A. Provide a list of advisory council members and designate groups and organizations which each represents.

Member's Name	Group or Organization Represented
	Parent
	Teacher
	Law Enforcement
	Medical Professional
	Local or State Government
	Community Organization
	Member at Large
	Member at Large
	Member at Large
	Member at Large

(Attach Additional Page if Necessary)

B. Briefly describe how the Local Advisory Council was involved in project planning.

NOTE: FIRST YEAR APPLICANTS AND PREVIOUS GRANT RECIPIENTS MUST COMPLETE ALL QUESTIONS ON THIS APPLICATION.

OKLAHOMA STATE DEPARTMENT OF EDUCATION
Gerald E. Hoeltzel, State Superintendent of Public Instruction

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APPLICATION

The Drug-Free Schools and Communities Act of 1986,
Part 2, Title V of the Augustus F. Hawkins—Robert T. Stafford
Elementary and Secondary School Amendments of 1988
(P.L. 100-297)

As amended by Public Law 100-694

1990-91 School Year

Application Closing Date: October 1, 1990

Funds have been appropriated by the U.S. Congress to establish programs of drug abuse education and prevention coordinated with related community efforts and resources. The Act provides federal financial assistance to states for grants to local and intermediate educational agencies and consortia to establish, operate, and improve local programs of drug abuse prevention, early intervention, rehabilitation referral, and education in elementary and secondary schools. Completion of this application is necessary to enable an LEA or consortium of LEAs to receive funds under this act. The LEA must submit its application to the SEA for approval within 120 days after the SEA notifies the LEA of its allocation.

Complete all parts of the application and send the original to:

Oklahoma State Department of Education
Drug Education; Comprehensive Health Section
Room 2-14, Hodge Education Building
2500 North Lincoln Boulevard
Oklahoma City, Oklahoma 73105-4599

Tecumseh	I-92	Pottawatomie	63
District Name	District Number	County	County Number

302 S. 9th, Tecumseh, Oklahoma	74873	$12,008.00
District Address	Zip Code	FY 1991 Allocation

$ -0-
FY 1989 Carry over (see page 8)
(School Year 89-90)

Charles Shields	(405) 598-3739
LEA Contact Person for Drug Education	(Area Code) Telephone Number

9-5-90	Jim V. Myers
Date	Signature of Authorized Representative

E. Briefly state any significant gains that have been observed since participating in this grant. (i.e. fewer reports of DUI, less vandalism, decline in drug referrals. increases in student support groups, etc.)

Improved awareness at all levels, improved communication and decision making at the elementary level. Student support groups and outward .student action has increased over the last 3 years. Surveys show alcohol steady but drug use is going down. Very few drug/alcohol incidents at school and more proactive events such as drug/ alcohol free parties by student groups are more evidence of positive impact of drug education programs.

VIII. *Local Advisory Council*

A. Provide a list of advisory council members. Match names of members with listed groups or organizations which each represent. If a listed group or organization cannot be represented, please attach an explanation to this section.

Member's Name	Group or Organization Represented
To Be Announced	Parent
Susanne Manlev	Teacher
Detective Al Turner	Law Enforcement
Pat Thomason	Medical Professional
Randy Swinson	Local or State Government
Rev. Nancy Danson	Community Organization
Jesse McCullar	Member at Large
	Member at Large
	Member at Large
	Member at Large

(Attach Additional Page if Necessary)

B. Briefly describe how the Local Advisory Council was involved in project planning.

The Chemical People movement gave us the beginnings of a solid base of support for programming. Plans were made at that time for community efforts. Some have been accomplished. It is time once again to initiate further planning for the future.

OKLAHOMA STATE DEPARTMENT OF EDUCATION
Sandy Garrett, State Superintendent of Public Instruction

APPLICATION

The Drug-Free Schools and Communities Act of 1986,
Part 2, Title V of the Augustus F. Hawkins—Robert T. Stafford
Elementary and Secondary School Amendments of 1988
(P.L. 100-297) As amended by Public Law 100-694

1991-92 School Year

Application Closing Date: October 15, 1991

Funds have been appropriated by the U.S. Congress to establish programs of drug abuse education and prevention coordinated with related community efforts and resources. The Act provides federal financial assistance to states for grants to local and intermediate educational agencies and consortia to establish, operate, and improve local programs of drug abuse prevention, early intervention, rehabilitation referral, and education in elementary and secondary schools. Completion of this application is necessary to enable an LEA or consortium of LEAs to receive funds under this act. The LEA must submit its application to the SEA for approval within 120 days after the SEA notifies the LEA of its allocation.

Complete all parts of the application and send the original to:

Oklahoma State Department of Education
Drug Education; Comprehensive Health Section
Room 2-14, Hodge Education Building
2500 North Lincoln Boulevard
Oklahoma City, Oklahoma 73105-4599

Tecumseh	I-92	Pottawatomie	63
District Name	District Number	County	County Number

302 S. 9th Tecumseh, Oklahoma	74873	$12,944.00
District Address	Zip Code	FY 1991 Allocation

$ -0-
FY 1989 Carry over (see page 8)
(School Year 90-91)

Charles Shields	(405) 598-3739
LEA Contact Person for Drug Education	(Area Code) Telephone Number

9-6-91	Jim V. Myers
Date	Signature of Authorized Representative

XI. Briefly state any significant gains that have been observed since participating in this grant. (i.e. fewer reports of DUI, less vandalism, decline in drug referrals. increases in student support groups, etc.)

Improved awareness at all levels, improved communication and decision making at the elementary level. Student support groups and outward student action has increased over the last 3 years. Surveys show alcohol steady but drug use is going down. Very few drug/alcohol incidents at school and more proactive events such as drug/alcohol free parties by student groups are more evidence of positive impact of drug education programs. A HOPE program has been implemented and extra sections have had to be added because of interest.

XII. Local Advisory Council

A. Provide a list of advisory council members. Match names of members with listed groups or organizations which each represent. If a listed group or organization cannot be represented, please attach an explanation to this section.

Member's Name	Group or Organization Represented
Barney Shirey	Parent

Danita Dayton	Teacher
Detective Al Turner	Law Enforcement
Pat Thomason	Medical Professional
Randy Swinson	Local or State Government
Rev. Pat Buss	Community Organization
Jesse McCullar	Member at Large
	Member at Large
	Member at Large
	Member at Large

(Attach Additional Page if Necessary)

B. Briefly describe how the Local Advisory Council was involved in project planning.

The Chemical People movement gave us the beginnings of a solid base of support for programming. Plans were made at that time for community efforts. Some have been accomplished and work continues on others.

Tecumseh — District Name
I-92 — District Number

PART A

PROBLEM INDICATORS

For elementary and secondary compuses in the district, indicate the number of drug-related activities.

Drug-Related Activities	Number of Incidences			
	1991-1992		1992 - 1993	
	Elem.	Sec.	Elem.	Sec.
1. Counseling referrals related to the use of illicit drugs or alcohol	0	29	0	24
2. Students referred for treatment related to the use of illicit drugs or alcohol	0	12	0	8
3. Disciplinary referrals related to possession or sale of illicit drugs or alcohol	0	3	0	3
4. Juvenile arrests for offenses related to illicit drugs or alcohol	0	0	0	0
5. Incidences of gang violence	0	0	0	0
6. Violent acts against students	0	0	0	0
7. Violent acts against teachers/staff	0	0	0	0

PART B

POLICIES

Please place an X for your districts student enrollment range.

	0-999	X	1,000-4,999		5,000 +

Are the following elements a part of the district's drug and alcohol policies?	Circle the appropriate response for each item	
1. Expulsion is a part of a range of sanctions for violations	(Yes)	(No)
2. Violation of the school's drug and alcohol policy results in notification of the students' parents by the school district	(Yes)	(No)
3. When a student violates the school drug policy pertaining to the use of illegal drugs participation in a counseling or treatment is required	(Yes)	(No)
4. Parents and other community members are involved in the creation, review and adoption of the school drug and alcohol policies	(Yes)	(No)
5. Different sanctions are used for violations involving alcohol for similar violations involving other illegal drugs	(Yes)	(No)
6. Notification of law enforcement officials for violations is a part of the school drug policy	(Yes)	(No)

APPLICATION PACKET

Drug-Free Schools and Communities Act of 1986
Three Year Application
FY 94, FY 95 and FY 96

Send the completed application and one copy to:
State Department of Education
2500 North Lincoln Blvd.
Oklahoma City, OK 73105-4599

DUE: OCTOBER 29, 1993

District Name Tecumseh District Number 1092

County Name Pottawatomie County Number 63

District Address 302 S. 9th

City Tecumseh Zip 74873

Name of Project Coordinator Tom Wilsie

Phone (405) 598-3739 Fax

Note: For school years 1994-95 and 1995-96, the local ed
submit a current year budget plus any revisions or modifi

Lisa Easley-Gage
521-4533
4507

If the LEA chooses NOT to participate in the 199 superintendent should sign in the space provided below Education. This signature authorizes the Department to

Signature _____

I. ASSESSMENT:

Analyze your current program. Determine what areas are in need of special emphasis for the next three years. You may find that in addition to your basic program, a special program designed to place emphasis on alcohol, or tobacco should be implemented. In order to identify program needs, many districts have opted to implement a student survey to determine baseline data as to how many students are using drugs, their patterns of use, and their attitudes about drugs. It is imperative that districts establish baseline date and to annually follow up on that information. Needs should be identified using objective measures (date bases), rather than using subjective measures (opinions).

A. Briefly describe the extent of current drug use in the school, including alcohol and tobacco.

The extent of current drug use in our schools vary depending on the site. The students in the lower grades in our elementary schools (K-5) are typical of other students this age. The use of drugs, including alcohol and tobacco, are minimal with occasional experimentation with these substance in the upper elementary. As the students move into the middle school and high school the experimentation level grows accordingly as does the instance of regular use. The middle school instance of alcohol and tobacco use is comparable with about 20% of the student shaving tried cigarettes or alcohol and about 10% having tried them many times. Less than five percent acknowledged having tried any other drugs such as marijuana.

B. What objective measures did you use to arrive at this assessment?

The students were given surveys to help evaluate the extent of the use of tobacco, alcohol and other drugs among our students. The surveys involved all students in grades three through eight and a cross section of students in our high school. At the high school level, parents and teachers were surveyed to gain their response to the amount of tobacco, alcohol and other drug use among our students.

Application for:
Safe and Drug-Free Schools
and Communities
1995-96 School Year (FY96)

[Logo]

Sandy Garrett
State Superintendent of Public Instruction
Oklahoma State Department of Education

District Information

Complete this application to apply for funds under the Safe and Drug-Free Schools and Communities program. A typewritten original copy of the district's application must be received or postmarked not later than Friday, May 26, 1995. Mail or hand deliver (DO NOT FAX) to: Health/Safety and Physical Education Section, State Department of Education, Room 315, 2500 North Lincoln Boulevard, Oklahoma City, Oklahoma 73105-4599. Direct questions or concerns to: Dr. Roy Allen (405) 265-4255 and/or Ms. Lisa Easley-Gage (405) 521-4507.

TYPE OF APPLICATION
Single District [X]
*Consortium

*If applying as a consortium, attach a list of all participating LEAs.

County Name and Number: Pottawatomie 63
District Name and Number: Tecumseh I092
Superintendent: Dr. Jim V. Myers
Mailing Address: 302 S. 9th
City, State, Zip: Tecumseh, OK 74873
Telephone: 405/598-3739
Contact person for the Safe and Drug-Free Schools grant:
Marty Lewis
(405) 598-3739 (405) 598-3739
(School number) (Summer number)

I hereby certify that we will comply with all assurances as set forth in the Safe and Drug-Free Schools and Communities Act of 1994.

Jim V. Myers
Signature of Superintendent

FOR SDE USE ONLY Signature of Approval Approval Date Allocation	REMINDER Attach all participating private nonprofit school applications to this application. DUE DATE MAY 26, 1995

2. ANALYSIS OF CURRENT USE

Through annual drug use and violence surveys given to our students, we have gained valuable information concerning our student population. This information allows us to evaluate the extent of the drug, alcohol and tobacco use among our students. It also gave us information concerning not only the use but the type most frequently used, the location of use, the extent the student see these items used at school and away from school. This year we also included a section on violence which helped us address another area. of concern for our young people. The survey asked for their views on how much violence they see at home or on television, how much violence they experience and participate in.

The use of the surveys have provided us with information concerning alcohol as our number one problem. Our students express that the main use is alcohol on the weekends. This has been a continuous problem area each year. We have not found other types of illegal or controlled substances to be a major problem although they do exist. The consequences of the use of, distribution, and/or possession of alcohol, illicit drugs or other chemical substances is positively forbidden on school property at any time by anyone. Any case involving the possession and misuse of narcotics and for dangerous drugs will be reported immediately to the principal or school official in charge. Any student under the influence of alcohol and/or drugs will be immediately removed from contact with other students. The principal will contact the parent or legal guardian. Law enforcement officials will be involved if deemed necessary. After proper notification, if the parent or guardian cannot or will not come to school, a letter will be sent to them describing the circumstances. Consequences may include the following:

A) The student will be suspended from five (5) days to a full semester out of school.

B) Student may be required to attend in school or out of school counseling sessions.

The extent of violence, safety and discipline problems we experience have been minimal. We have had fights which resulted in suspension for the Student(s) participating and/or instigating the problem. Fighting or violent behavior in any form is not tolerated and is dealt with on an individual basis. The issue of safety is always an important focus for our school. From kindergarten to the high school we place a great deal of emphasis and importance on this area. The discipline problems we experience at each site are very typical for the age group involved. The discipline policies in place at each site have been effective and will continue to be enforced as needed.

3. COMPREHENSIVE PLAN

Tecumseh Public Schools believe all students have a right to come to school and learn in a healthy environment with clear minds. It is our belief that most youth do not use drugs. Our curriculum should, therefore, enhance the development of life skills that keep students from using drugs/alcohol. It focuses on positive prevention, building academic and life skills, developing decision making skills, and providing appropriate adult guidance.

The curriculum will present the message that using illegal drugs/alcohol is wrong and harmful. To combat student drug/alcohol use, the entire community must be involved. Cooperation between parents, school, students, law enforcement authorities, and religious and community organizations is essential if we are to make a difference.

Each building, because of our grade center orientation, will have their own age appropriate curriculum based on the overall philosophy and coordinated to bring about a strong K-12 program. "Developing Capable People," by Dr. Stephen H. Glenn, will be the central program used to build self-

esteem, decision making skills, and communication skills. Training has been ongoing for all of our teachers. The "Developing Capable People" program emphasizes self-reliance and the skills necessary to gain that status. It trains personnel in the process to enable students to gain necessary skills to be self-reliant and yet interconnected to their peers and society. It is an ongoing process based on treating people, regardless of age, with respect and dignity.

Krouch (Kindergarten)

Krouch. being an early childhood center, emphasizes self-worth and getting along with others in their curriculum. They have access to an elementary counselor one day each week and the counselor will work with the children in group settings on an ongoing basis. Areas covered will include sharing, feelings, friends, helpers, safety, etc. Videos, We Awareness, Learning to Live Drug Free, and DARE materials will be utilized.

Krouch school will also take part in the Red Ribbon Campaign, an intensive one week drug education program for the entire community. Age appropriate activities will be organized and coordinated through the regular classrooms. Speakers from various sources will serve as resource personnel throughout the year and visit the regular classrooms.

Barnard (Pre-l st. 1 st and 2nd Grades)

The "Developing Capable People" program is in place at Barnard and is the backbone of the drug/alcohol prevention program there. Through the goals and objectives of the program students will begin to establish good decision making skills, positive self-esteem, cooperative and community solutions to problems, and self-reliance.

The elementary counselor at Barnard will meet with each class weekly throughout the year utilizing various materials such as filmstrips, Learning to Live Drug Free, and Kids are People Too from DARE. Individual counseling incorporating Dr. Glenn's philosophies is scheduled anytime students need help. Another technique for helping students who are experiencing problems is a counselor led problem solving class. Directed play offers the students a method of interacting positively with peers. Barnard takes part in the yearly Red Ribbon Campaign with activities scheduled for the regular classroom and PE programs.

Application for: [Logo]
Safe and Drug-Free Schools
and Communities
1996-97 School Year (FY97)

Sandy Garrett
State Superintendent of Public Instruction
Oklahoma State Department of Education

District Information

Complete this application to apply for funds under the Safe and Drug-Free Schools and Communities program. A typewritten original copy of the district's application must be received or postmarked not later than Friday, May 26, 1995. Mail or hand deliver (DO NOT FAX) to: Health/Safety and Physical Education Section, State Department of Education, Room 315, 2500 North Lincoln Boulevard, Oklahoma City, Oklahoma 73105-4599. Direct questions or concerns to: Dr. Roy Allen (405) 265-4255 and/or Ms. Lisa Easley-Gage (405) 521-4507.

TYPE OF APPLICATION
Single District [X]
*Consortium

*If applying as a consortium, attach a list of all participating LEAs.

County Name and Number: Pottawatomie 63
District Name and Number: Tecumseh I092
Superintendent: Dr. Jim V. Myers
Mailing Address: 302 S. 9th
City, State, Zip: Tecumseh, OK 74873
Telephone: 405/598-3739
Contact person for the Safe and Drug-Free Schools grant:
Marty Lewis, Assistant Superintendent
(405) 598-3739 (405) 598-3739
(School number) (Summer number)

I hereby certify that we will comply with all assurances as set forth in the Safe and Drug-Free Schools and Communities Act of 1994.

Jim V. Myers
Signature of Superintendent

FOR SDE USE ONLY Signature of Approval Approval Date Allocation	**REMINDER** Attach all participating private nonprofit school applications to this application. DUE DATE JUNE 28, 1996

2. Analysis of Current Drug Use and Student Violence

Through annual drug use and violence surveys given to our students, we have gained useful information regarding our student population. This information allows us to more objectively evaluate the extent of the drug, alcohol and tobacco use among our students. It also gave us information concerning not only the use but the type most frequently used, the location of use, the extent the students see these items used at school and away from school. Included in the survey was a section on violence which assists us in addressing another area of concern regarding our young people.

The use of tobacco and alcohol continue to be our number one problems. Our students utilize that alcohol primarily on the weekends and use tobacco, especially smokeless tobacco, on a more regular basis. Other types of drugs including, controlled dangerous substances, are present but have not identified themselves as major problems at this time. Per Board policy, it is expressly forbidden to use, distribute, and/or possess alcohol, illicit drugs or other chemical substances on school property at any time by anyone. Any case involving violation of this policy is to be reported to the principal or school official in charge. Should any student be under the influence of alcohol and/or drugs he/she will be immediately removed from contact with other students. Parents will be contacted in these cases and law enforcement officials will be notified if deemed necessary. Consequences may include the following:

1. The student will be suspended from five (5) days to a full semester out of school.
2. The student may be required to attend in school or out of school counseling sessions.

Minimal problems have been experienced due to violence, safety and discipline problems. Some fights have taken place,

in those cases suspensions have be implemented for the student(s) participating and/or instigating the problem. Fighting or violent behavior of any form is not tolerated and is dealt with on an individual basis. The issues of violence, safety and discipline are very important areas for our district. The discipline policies in place at each site have been effective in dealing with the problems and will continue to be renewed and enforced as needed.

3. Comprehensive Plan

Tecumseh Public Schools believe all students have a right to come to school and learn in a healthy environment with clear minds. It is our belief that most youth do not use drugs. Our curriculum should, therefore, enhance the development of life skills that keep students from using drugs/alcohol. It focuses on positive prevention, building academic life skills, developing decision making skills, and providing appropriate adult guidance.

Our curriculum will continue to focus on presenting the message that using illegal drugs/alcohol/tobacco is wrong and harmful. To combat use of these substances we will try to enlist the help and support of the entire community .Cooperation among parents, schools, students, law enforcement authorities, and religious and community organizations is essential if we are to make a difference.

Each building, because of our grade center orientation, will have their own age appropriate curriculum based on the overall philosophy and coordinated to bring about a strong K-12 program. "Developing Capable People," by Dr. Stephen H. Glenn and "Love and Logic," by Jim Fay and Foster Cline, will be central pans of our efforts to build self- esteem, decision making skills, and communication skills. Training has been ongoing for all our teachers with both of these programs. These two programs complement each other

Safe and Drug-Free
Schools and
Communities
1997-98 School Year (FY98)

[Logo]

Sandy Garrett
State Superintendent of Public Instruction
Oklahoma State Department of Education

63 POTTAWATOMIE I092 TECUMSEH

SCHOOL DISTRICT EXPENDITURES

TYPE OF APPLICATION

Single District [X]

*Consortium

*If applying as a consortium, attach a list of all participating LEAs.

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Rs. Lisa

County Name and Number: Pottawatomie 63

District Name and Number: Tecumseh I092

Superintendent: Dr. Jim V. Myers

Mailing Address: 302 South 9th Street

City, State, Zip: Tecumseh, OK 74873

Telephone: (405) 598-3739

Contact person for the Safe and Drug-Free Schools grant:

Danny Jacobs

(405) 598-3739 (School number)

(405) 598-3739 (Summer number)

I hereby certify that we will comply with all assurances as set forth in the Safe and Drug-Free Schools and Communities Act of 1994.

Jim V. Myers
Signature of Superintendent

FOR SDE USE ONLY

Lisa Easley-Gage — Signature of Approval

June 3, 1997 — Approval Date

10,929.00 — Allocation

REMINDER

Attach all participating private nonprofit school applications to this application.

DUE DATE
MAY 30, 1997

Sandy Garrett [Logo]
State Superintendent of Public Instruction
Oklahoma State Department of Education
Safe and Drug-Free Schools and Communities
1998-99 School Year (FY99)

District Information

Complete this application to apply for funds under the Safe and Drug-Free Schools and Communities program. A typewritten original copy of the district's application must be received or postmarked not later than Single District Friday, May 29, 1998. Mail or hand deliver (DO NOT FAX) to:

Health/Safety and Physical Education Section, State Department of Education, Room 315, 2500 North Lincoln Boulevard, Oklahoma City, Oklahoma 73105-4599. Direct questions or concerns to: Ms. Lisa Easley-Gage (405) 521-4507.

TYPE OF APPLICATION
Single District
*Consortium

County Name and Number: Pottawatomie 63
District Name and Number: Tecumseh I092
Superintendent: Tom Wilsie
Mailing Address: 302 S. 9th
City, State, Zip: Tecumseh, OK 74873
Telephone: 405/598-3739
Contact person for the Safe and Drug-Free Schools grant:
Danny Jacobs
(405) 598-3739 (School number)
(405) 598-3739 (Summer number)

*If applying as a consortium, attach a list of all participating LEAs.
participating LEAs.

I hereby certify that we will comply with all assurances as set forth in the Safe and Drug-Free Schools and Communities Act of 1994.

Tom Wilsie
Signature of Superintendent

FOR SDE USE ONLY	
Signature of Approval / Approval Date	DUE DATE: FRIDAY MAY 29, 1998
Allocation	

2. Analysis of Current Drug Use and Student Violence (continued)

The use of tobacco and alcohol continue to be our number one problems. Our students utilize alcohol primarily on the weekends and use tobacco, especially smokeless tobacco, on a more regular basis. Other types of drugs including controlled dangerous substances, are present but have not identified themselves as major problems at this time. Per Board policy, it is expressly forbidden to use, distribute, and/or possess alcohol, illicit drugs or other chemical substances on school property at any time by anyone. Any case involving violation of this policy is to be reported to the principal or school official in charge. Should any student be under the influence of alcohol and/or drugs he/she will be immediately removed from contact with other students. Parents will be contacted in these cases and law enforcement officials will be notified if deemed necessary. Consequences may include the following:

1. The student will be suspended from five (5) days to a full semester out of school.
2. The student may be required to attend in school or out of school counseling sessions.

Minimal problems have been experienced due to violence. safety and discipline problems. We have remained somewhat immune from gang activity. but staff members will continue to be trained in the identification and proper response to such activity. Some fights have taken place, in those cases suspensions have been implemented for the student(s) participating and/or instigating the problem. Fighting or violent behavior of any form is not tolerared and is deal with on an individual basis. The issues of violence, safety and discipline are very important areas for our district. The discipline policies in place at each site have been effective in dealing with the problems and will continue to be renewed and enforced as needed.

TECUMSEH PUBLIC SCHOOLS
STUDENT ACTIVITIES DRUG TESTING POLICY
Athletics-Cheerleader-Pom Pon-Band-Vocal-FFA-FHA-Academic Team

The Tecumseh Board of Education in an effort to protect the health and safety of its extra-curricular activities students from illegal and/or performance-enhancing drug use and abuse, thereby setting an example for all other students of the Tecumseh Public School District, proposes to adopt the following policy for drug testing of activity students.

STATEMENT OF PURPOSE AND INTENT

Although the Board of Education, administration, and staff desire that every student in the Tecumseh Public School District refrain from using or possessing illegal drugs, district officials realize that their power to restrict the possession or use of illegal and performance-enhancing drugs is limited. Therefore, this policy governs only performance-enhancing and illegal drug use by students participating in extra-curricular activities. The sanctions imposed for violations of this policy will be limitations solely upon limiting the opportunity of any student determined to be in violation of this policy to a student's privilege to participate in extra-curricular activities. No suspensions from school or academic sanctions will be imposed for violations of this policy. This policy supplements and complements all other policies, rules, and regulations of the Tecumseh Public School District regarding possession or use of illegal drugs.

Participation in school-sponsored extra-curricular activeities at the Tecumseh Public School District is a privilege. Students who participate in these activities are respected by the student body and are representing the school district and the community. Accordingly, students in extra-curricular activities carry a responsibility to themselves, their fellow students, their parents and their school to set the highest

possible examples of conduct, sportsmanship, and training, which includes avoiding the use or possession of illegal drugs. Additionally, this school district is contracted to follow the rules and regulations of the OSSAA whose Rule No. 4, Section 1 (a) specifically states: *"A student whose conduct or character at school is under discipline or whose conduct or character outside the school is such as to reflect discredit upon the school shall be ineligible until reinstated."*

The purposes of this policy are five-fold:

1. To educate students of the serious physical, mental and emotional harm caused by illegal drug use.
2. To alert students with possible substance abuse problems to the potential harms that drug use poses for their physical, mental, and emotional well-being and offer them the privilege of competition as an incentive to stop using such substances.
3. Ensure that students adhere to a training program that bars the intake of illegal and performance-enhancing drugs.
4. To prevent injury, illness, and harm for students that may arise as a result from illegal and performance-enhancing drug use.
5. To offer students practices, competition and school activities free of the effects of illegal and performance-enhancing drug use.

Illegal and performance-enhancing drug use of any kind is incompatible with the physical, mental, and emotional demands placed upon participants in extra-curricular activities and upon the positive image these students project to other students and to the community on behalf of the Tecumseh Public School District. For the safety, health and well being of students in extra-curricular activities, the

Tecumseh Public School District has adopted this policy for use by all participating in extra-curricular activities in grades 7-12.

The administration may adopt regulations to implement this policy.

I. Definitions

"Activity student" means a member of any middle school or high school Tecumseh Public School District sponsored extra-curricular organization. This includes any student that represents Tecumseh Schools in any extra-curricular activity such as FFA, FHA, Academic Team, Band, Vocal, Pom Pon, Cheerleader and Athletics.

"Drug use test" means a scientifically substantiated method to test for the presence of illegal or performance-enhancing drugs or the metabolites thereof in a person's urine.

"Random Selection Basis" means a mechanism for selecting activity students for drug testing that:

A. results in an equal probability that any activity student from a group of activity students subject to the selection mechanism will be selected, and

B. does not give the School District discretion to waive the selection of any activity student selected under the mechanism.

"Illegal drugs" means any substance which an individual may not sell, possess, use, distribute or purchase under either Federal or Oklahoma law. *"Illegal drugs"* includes, but is not limited to, all scheduled drugs as defined by the Oklahoma Uniform Controlled Dangerous Substance Act, all prescription drugs obtained without authorization, and all prescribed and over-the-counter drugs being used for an abusive purpose. "Illegal drugs" shall also include alcohol.

"Performance-enhancing drugs" include anabolic steroids and any other natural or synthetic substance used to increase muscle mass, strength, endurance, speed or other athletic ability. The term *"performance-enhancing drugs"* does not include dietary or nutritional supplements such as vitamins, minerals and proteins which can be lawfully purchased in over-the counter transactions.

"Positive" when referring to a drug use test administered under this policy means a toxicological test result which is considered to demonstrate the presence of an illegal or a performance-enhancing drug or the metabolites thereof using the standards customarily established by the testing laboratory administering the drug use test.

"Reasonable suspicion" means a suspicion of illegal or performance-enhancing drug use based on specific observations made by coaches/ administrators/sponsors of the appearance, speech, or behavior of an activity student; the reasonable inferences that are drawn from those observations; and/or information of illegal or performance-enhancing drug use by an activity student supplied to school officials by other students, staff members, or patrons.

II. Procedures

A physical examination signed by a parent/guardian is required before a student may participate on a Tecumseh School athletic team. A urine screen to detect the presence of illegal or performance-enhancing drugs which could have a harmful effect on the prospective athlete's health and athletic performance will be included as part of that physical examination. For non-athletic activities a urine screen test only will be required.

Each activity student shall be provided with a copy of the "Student Drug Testing Consent Form" which shall be read, signed and dated by the student, parent or custodial guardian

and coach/sponsor before such student shall be eligible to practice or participate in any extra-curricular activities. The consent requires the activity student to provide a urine sample: (a) as part of the student's annual physical or for eligibility for participation; (b) when the activity student is selected by the random selection basis to provide a urine sample; and (c) at any time when there is reasonable suspicion to test for illegal or performance-enhancing drugs. *No student shall be allowed to practice or participate in any extra-curricular activities unless the student has returned the properly signed "Student Drug Testing Consent Form."*

Prior to the commencement of drug testing each year an orientation session will be held with each student athlete or participant in extra-curricular activities to educate them of the sample collection process, privacy arrangements, drug testing procedures and other areas which may help to reassure the activity student and help avoid embarrassment or uncomfortable feelings about the drug testing process.

Each student athlete or participant in extra-curricular activities shall receive a copy of the Student Activities Drug Testing Policy. The head coach or sponsor shall be responsible for explaining the Policy to all prospective students, and for preparing an educational presentation to acquaint the student with the harmful consequences of drug and alcohol use and abuse.

All student athletes shall be required to provide a urine sample for drug use testing for illegal drugs as part of their annual physical examination. Student athletes who have physical examinations done by their personal physician must nonetheless comply with the policy requirements set out below regarding drug use testing. *A student who moves into the district after the school year begins will have to undergo a drug test or provide proof of a clear drug test administered during the school year before they will be eligible for participation.*

Drug use testing for extra-curricular students will also be chosen on a random selection basis monthly from a list of all extra-curricular students who are involved in off-season or in-season activities. The Tecumseh Public School District will determine a monthly number of student names to be drawn at random to provide a urine sample for drug use testing for illegal or performance-enhancing drugs.

In addition to the drug tests required above, any activity student may be required at any time to submit to a test for illegal or performance-enhancing drugs, or the metabolites thereof when an administrator, coach, or sponsor has reasonable suspicion of illegal or performance-enhancing drug use by that particular student.

The Tecumseh Public School District will set a fee to be collected from the student when this consent form is signed and returned to the coach or sponsor before the beginning of the season.

Any drug use test will be administered by or at the direction of a professional laboratory chosen by the Tecumseh Public School District. The professional laboratory shall be required to use scientifically validated toxicological testing methods, have detailed written specifications to assure chain of custody of the specimens, and proper laboratory control and scientific testing.

All aspects of the drug use-testing program, including the taking of specimens, will be conducted so as to safeguard the personal and privacy rights of the student to the maximum degree possible. The test specimen shall be obtained in a manner designed to minimize intrusiveness of the procedure. In particular, the specimen must be collected in a restroom or other private facility behind a closed stall. The principal/athletic director shall designate a coach or school employee of the same sex as the student to accompany the student to a restroom or other private facility behind a closed

stall. The monitor shall not observe the student while the specimen is being produced, but the monitor shall be present outside the stall to listen for the normal sounds of urination in order to guard against tampered specimens and to insure an accurate chain of custody. The monitor shall verify the normal warmth and appearance of the specimen. If at any time during the testing procedure the monitor has reason to believe or suspect that a student is tampering with the specimen, the monitor may stop the procedure and inform the principal/athletic director who will then determine if a new sample should be obtained. The monitor shall give each student a form on which the student may list any medications legally prescribed for the student, he or she has taken in the preceding thirty (30) days. The parent or legal guardian shall be able to confirm the medication list submitted by their child during the twenty-four (24) hours following any drug test. The medication list shall be submitted to the lab in a sealed and confidential envelope and shall not be viewed by district employees.

An initial positive test result will be subject to confirmation by a second and different test of the same specimen. The second test will use the gas chromatography/mass spectrometry technique. A specimen shall not be reported positive unless the second test utilizing the gas chromatography/mass spectrometry procedure is positive for the presence of an illegal drug or the metabolites thereof. The unused portion of a specimen that tested positive shall be preserved by the laboratory for a period of six (6) months or the end of the school year, whichever is shorter. Student records will be retained until the end of the school year.

III. Confidentiality

The laboratory will notify the principal/athletic director or designee of any positive test. To keep the positive test results confidential, the principal/athletic director or designee will

only notify the student, the head coach/sponsor, and the parent or custodial guardian of the student of the results. The principal/athletic director or designee will schedule a conference with the student and parent or guardian and explain the student's opportunity to submit additional information to the principal/athletic director or to the lab. The Tecumseh Public School District will rely on the opinion of the laboratory which performed the test in determining whether the positive test result was produced by something other than consumption of an illegal or performance-enhancing drug.

Test results will be kept in files separate from the student's other educational records, shall be disclosed only to those school personnel who have a need to know, and will not be turned over to any law enforcement authorities.

IV. Appeal

An extra-curricular student who has been determined by the principal/athletic director to be in violation of this policy shall have the right to appeal the decision to the Superintendent or his/her designee(s). Such request for a review must be submitted to the Superintendent in writing within five (5) calendar days of notice of the positive test. A student requesting a review will remain eligible to participate in any extra-curricular activities until the review is completed. The Superintendent or his/her designee(s) shall then determine whether the original finding was justified. No further review of the Superintendent's decision will be provided and his/her decision shall be conclusive in all respects. Any necessary interpretation or application of this policy shall be in the sole and exclusive judgment and discretion of the Superintendent which shall be final and non-appealable.

V. Consequences

Any extra-curricular student who tests positive in a drug test under this policy shall be subject to the following restrictions:

A. *For the First Offense:*

The parent/guardian will be contacted immediately and a private conference will be scheduled to present the test results to the parent/guardian. A meeting will then be set up with the student, parent/guardian, athletic director, and principal concerning the positive drug test. In order to continue participation in the activity the student and parent/guardian must, within five (5) days of the joint meeting, show proof that the student has received drug counseling from a qualified drug treatment program or counseling entity. Additionally, the student must voluntarily submit to a second drug test to be administered within two (2) weeks in accordance with the testing provisions of this policy.

If parent/guardian and student agree to these provisions, the student will continue to participate in the activity. Should the parent/student not agree to these provisions the consequences listed in this policy for the second offense will be imposed.

B. *For the Second Offense:*

Suspension from participation in *all* extra-curricular activities for (14) calendar days, and successful completion of four (4) hours of substance abuse education/counseling provided by the school. The student may not participate in any meetings, practices, scrimmages or competitions during this period. The student will be randomly tested monthly for the remainder of the school year. The time and date will be unknown to the student and determined by the principal/athletic director or designee.

These restrictions and requirements shall begin immediately, consecutive in nature, unless a review appeal is filed following receipt of a positive test. Provided, however, a student who on his or her own volition informs (self-refers) the athletic director, principal, or coach/sponsor of usage before being notified to submit to a drug use test will be allowed to remain active in all extra-curricular activities. Such student will however, be considered to have committed his/her first offense under the policy, and will be required to re-test as would a student who has tested positive.

C. *For the Third Offense (in the same school year):*

Complete suspension from participation in *all* extra-curricular activities including all meetings, practices, performances, and competition for the remainder of the school year, or eighty-eight school days (1 semester) whichever is the longer.

VI. Refusal to Submit to Drug Use Test

A participating student who refuses to submit to a drug use test authorized under this policy, shall not be eligible to participate in any extra-curricular activities including all meetings, practices, performance and competitions for the *remainder of the school year*. Additionally, such student shall not be considered for any extra-curricular activity honors or awards given by the school.

* * * *

Tecumseh Public Schools is committed to cooperating with parents/guardians in an effort to help students avoid illegal drug use. The Tecumseh Public School District believes accountability is a powerful tool to help some students avoid using drugs and that early detection and intervention can save lives.

Tecumseh Public School District
Student Drug Testing Consent Form

Statement of Purpose and Intent

Participation in school sponsored extra-curricular activities at the Tecumseh School District is a privilege. Extra-curricular students carry a responsibility to themselves, their fellow students, their parents, and their school to set the highest possible examples of conduct, which includes avoiding the use or possession of illegal drugs.

Drug use of any kind is incompatible with participation in extra-curricular activities on behalf of the Tecumseh Public School District. For the safety, health, and well being of the student of the Tecumseh Public School District, the Tecumseh Public School District has adopted the attached Student Activities Drug Testing Policy and the Student Drug Testing Consent for use by all participating students at the middle school and high school levels.

Participation in Extra-Curricular Activities

Each extra-curricular activity student shall be provided with a copy of the Student Activities Drug Testing Policy and Student Drug Testing Consent which shall be read, signed and dated by the student, parent or custodial guardian, and coach/sponsor before such student shall be eligible to practice or participate in any extra-curricular activities. The consent shall be to provide a urine sample: a) as part of their annual physical or for eligibility for participation; b) as chosen by the random selection basis; and c) at any time requested based on reasonable suspicion to be tested for illegal or performance-enhancing drugs. No student shall be allowed to practice or participate in any extra-curricular activity unless the student has returned the properly signed Student Drug Testing Consent.

_____

Student's Last Name First Name MI

I understand after having read the "Student Activity Drug Testing Policy" and "Student Drug Testing Consent" that, out of care for my safety and health, the Tecumseh Public School District enforces the rules applying to the consumption or possession of illegal and performance-enhancing drugs. As a member of a Tecumseh extra-curricular activity, I realize that the personal decision that I make daily in regard to the consumption or possession of illegal or performance-enhancing drugs may affect my health and well-being as well as the possible endangerment of those around me and reflect upon any organization with which I am associated. If I choose to violate school policy regarding the use or possession of illegal or performance enhancing drugs any time while I am involved in in-season or off-season activities, I understand upon determination of that violation I will be subject to the restrictions on my participation as outlined in the Policy.

_____

Signature of Student Date

We have read and understand the Tecumseh Public School District "Student Activities Drug Testing Policy" and "Student Drug Testing Consent." We desire that the student named above participate in the extra-curricular programs of the Tecumseh Public School District, and we hereby voluntarily agree to be subject to its terms. We accept the method of obtaining urine samples, testing and analysis of such specimens, and all other aspects of the program. We further agree and consent to the disclosure of the sampling, testing and results as provided in this program.

_____

Signature of Parent or Custodial Guardian Date

_____

Signature of Coach Team

Medication List

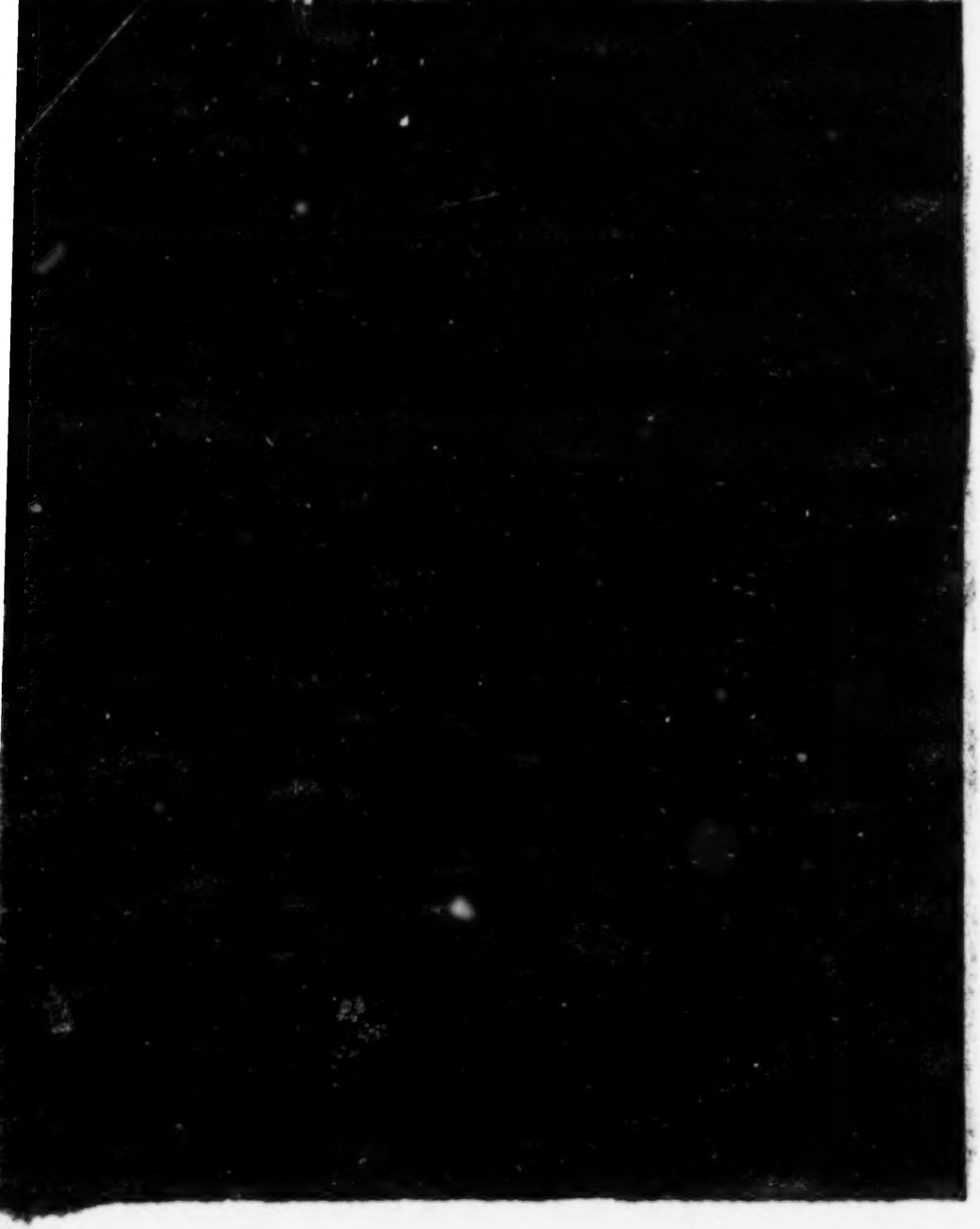
I, _____, am currently taking or have taken the following drugs, substances, or medications in the last thirty (30) days: (Medications must be legally prescribed for extra-curricular activity student.)

_____

_____

Additional Information: _____

_____



(12)

No. 01-332

DEC 31 2001

CLERK

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY and INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY,
Petitioners,

v.

LINDSAY EARLS and LACEY EARLS, minors, by their next friends and parents, John David and Lori Earls, and DANIEL JAMES, a minor, by his next friend and mother, Leta Hagar,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF PETITIONERS

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LINDA MARIA MEOLI *
STEPHANIE J. MATHER
WILLIAM P. BLEAKLEY
THE CENTER FOR EDUCATION

55 pp

QUESTION PRESENTED

The question presented is whether the Tenth Circuit Court of Appeals properly determined that a board of education cannot validly exercise its judgment in an effort to deter and eliminate student drug use by enacting a suspicionless drug-testing policy covering students who voluntarily engage in interscholastic competition unless the board has first specifically identified and quantified the actual drug users among the students to be tested.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CITED AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
I. THE RECORD	2
A. The District	2
B. Tecumseh's Drug Problem	4
C. Other Measures Implemented by Tecumseh to Combat Drug Usage	7
D. The Policy	8
II. THE RULING OF THE DISTRICT COURT	10
III. THE RULING OF THE COURT OF APPEALS	12
SUMMARY OF ARGUMENT	13
ARGUMENT	14
I. THE NATURE OF THE SCHOOL ENVIRONMENT IS RECOGNIZED AS ONE WHICH REQUIRES A RELAXATION OF RIGHTS AFFORDED BY THE U.S. CONSTITUTION	14
II. A RELAXATION OF RIGHTS AFFORDED BY THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION	17

TABLE OF CONTENTS—Continued

	Page
A. Searches Based on Individualized Suspicion in a Special Needs Environment	17
B. Suspicionless Searches in Non-School "Special Needs" Environments	21
C. Searches Not Based On Individual Suspicion In the "Special Needs" School Environment	24
III. TECUMSEH'S DRUG TESTING POLICY IS CONSTITUTIONAL	33
A. The Legitimate Expectation of Students Engaged in Interscholastic Competition is Diminished to a Greater Degree Than the Already Diminished Privacy Expectations of the General Student Body	33
B. The Character of the Privacy Intrusion is Not Significant	36
C. The Nature of Tecumseh's Concern is Important Enough to Justify Suspicionless Drug Testing	37
D. The Nature of Tecumseh's Concern is Sufficiently Immediate to Justify Suspicionless Testing	47
CONCLUSION	49

TABLE OF CITED AUTHORITIES

CASES	Page
Acton v. Vernonia, 796 F. Supp. 1354 (D. Or., 1992)	25
Acton v. Vernoina, 23 F.3d 1514 (9th Cir.1994)	48
Aubrey v. School Board of Lafayette Parrish, 148 F.3d 559 (5th Cir. 1998)	33
Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986)	17
Board of Educ., Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 583 (1982)	16
Board of Educ. of Ind. Sch. Dist. No.92 of Pottawatomie County v. Earls, ___U.S.___, 122 S.Ct. 509 (Mem)	1
Brown v. Bd. of Education, 347 U.S. 483 (1954)	14, 15
Camara v. Municipal Court, 387 U.S. 523 (1967)	18
Chandler v. Miller, 520 U.S. 305 (1997)	23, 24
Desilets v. Clearview Bd. of Education, 627 A.2d 667 (N.J. Super. A.D., 1993)	43, 45
Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., 115 F.Supp. 1281 (W.D. Okl. 2000)	1, 7, 11, 12
Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., 242 F.3d 1264 (10th Cir.2001)	*passim*
Epperson v. Arkansas, 393 U.S. 97 (1968)	15
Ferguson v. Charleston, 532 U.S. 67, 121 S.Ct. 1281 (2001)	- 24
Goss v. Lopez, 419 U.S. 565 (1975)	16
Griffin v. Wisconsin, 483 U.S. 868 (1987)	21
Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)	17
Ingraham v. Wright, 430 U.S. 651 (1977)	16, 17
Knox County Educ. v. Knox County Bd. of Educ., 158 F.3d 361 (6th Cir. 1998)	32, 33
Miller v. Wilkes, 172 F.3d 574 (8th Cir.1999)	30, 31

TABLE OF CITED AUTHORITIES—Continued

CASES	Page
National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989)	22, 23, 42
New Jersey v. TLO, 469 U.S. 325 (1985)	15, 17, 18, 19, 20, 34, 40
O'Connor v. Ortega, 480 U.S. 709 (1987)	20, 21
Schaill v. Tippecanoe County School Corp., 864 F.2d 1309 (7th Cir.1988)	29
Skinner v. Railway Labor Executives Association, 489 U.S. 602 (1989)	21, 22
Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969)	15
Todd v. Rush, 133 F.3d 984 (7th Cir.1998)	29, 30
United States v. Cortez, 449 U.S. 411 (1981)	19
Vernonia School District 47J v. Acton, 515 U.S. 646 (1995)	*passim*
Webb v. McCullough, 828 F.2d 1151 (6th Cir.1987)	44
Wood v. Strickland, 420 U.S. 308, 326 (1975)	15
CONSTITUTION AND STATUTES	
U.S. Const. amend. IV	1
28 U.S.C. §1254(1)	1
MISCELLANEOUS	
Petitioner's Brief, *Vernonia School Dist. 47J*, 515 U.S. 646 (1995) (No. 94-590)	42
Respondent's Brief, *Vernonia School Dist. 47J*, 515 U.S. 646 (1995) (No. 94-590)	25

OPINIONS BELOW

The opinion of the court of appeals is reported at 242 F.3d 1264 (10th Cir. 2001) and is included in Appendix A to the Petition for a Writ of Certiorari at pages 1a through 45a. The court of appeals' order denying a petition for rehearing *en banc* is found at Appendix B to the Petition for a Writ of Certiorari at pages 50a through78a. The court of appeals' order granting attorney fees and costs is found at Appendix C to the Petition for Writ of Certiorari at pages 47a through 49a. The district court's opinion is reported at 115 F.Supp.2d 1281 (W.D. Okl. 2000) and is included in Appendix D to the Petition for Writ of Certiorari at pages 50a through 78a. The district court's judgment and amended judgment are found at Appendix E, page 79a and Appendix F, pages 80a and 81a to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion on March 21, 2001, and denied rehearing and rehearing *en banc* on May 30, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1). Petitioners filed their Petition for a Writ of Certiorari on August 24, 2001. This Court granted the Writ of Certiorari on November 8, 2001, found at ___U.S.___, 122 S.Ct. 509 (Mem).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This case arises from the adoption in September 1998 and the implementation in October 1998 of the Student Activities Drug Testing Policy ("Policy") by the Petitioner Board of Education of Independent School District No. 92 of Pottawatomie County ("Board of Education").[1] The Policy requires Tecumseh students in the seventh through twelfth grades who wish to engage in interscholastic competition to consent to urinalysis testing. High school juniors Lindsay Earls and Daniel James, through their parents, initiated this action against the Board of Education in August 1999 seeking injunctive relief and a declaratory judgment that the Policy is unconstitutional.

I. THE RECORD

A. The District.

The City of Tecumseh, Oklahoma, is located approximately forty miles southeast of Oklahoma City, Oklahoma. Any child residing within the community is entitled to receive a public education at Tecumseh. Not unlike all other public schools in the nation, the Board of Education has for many years offered its students the opportunity to participate in school-sponsored extracurricular activities. (J.A. 8).[2] A majority of its high school students participate in at least one extracurricular activity in Tecumseh. (*Id.*) Participation in all extracurricular activities provided by the Board of Education is voluntary and is open to all students who meet the requirements to participate in the activity. (J.A. 31). The requirements for each activity necessarily depend upon the activity involved and the requirements therefore.

[1] Petitioner Independent School District No. 92 of Pottawatomie County will be hereinafter referred to as "Tecumseh."

[2] References to the Joint Appendix are denoted as "J.A."; references to the record are denoted as "R."; and references to the Appendix to the Petition for a Writ of Certiorari are denoted as "Pet. App."

(J.A. 32). As examples, a student must be in or have taken a class in French in order to participate in the French Club, and the National Honor Society is only open to those students who evidence academic excellence. (J.A. 24, 25).

Some of the extracurricular activities provided by the Board of Education go beyond intradistrict fellowship and additionally offer opportunities for students to test their skills and compete against other students outside the confines of Tecumseh, Oklahoma. These activities, which will be referred to hereinafter as Competitive Activities are: Athletics,[3] Academic Team, Band, Vocal, Future Homemakers of America (FHA), Future Farmers of America (FFA), Cheerleading and Pom Pom. (J.A. 20, 21). The interscholastic competitions that students engage in when they choose to participate in Competitive Activities are not only offered by Tecumseh, but they are also offered, scheduled and regulated by the Oklahoma Schools Secondary Activities Association (OSSAA), (R., Ex. A to Defendants' Brief in Support of Motion for Summary Judgment filed November 17, 1999). Only the Competitive Activities covered under the Policy are subject to the outside governance of the OSSAA. (J.A. 104, 105).

[3] The record is silent as to the interscholastic nature of the athletic program in Tecumseh because Respondents did not challenge the practice of random drug testing for those students participating in athletics, acknowledging that it is "a practice approved by the U.S. Supreme Court." (J.A. 8). Although Respondents conceded that drug-testing of student athletes was permissible, other students (also represented by the American Civil Liberties Union) challenged the drug-testing of athletes in the case of *York v. Wahkiakum School Dist. No. 200*, Case No. 99-2-0075-6, filed in the Superior Court of Wahkiakum County, Washington in December of 1999. That case is still pending in the Superior Court, and the Plaintiffs there assert that drug-testing of athletes is unconstitutional unless the school district is able to prove that student athletes "were more likely to use drugs than the general school population or that athletes had somehow been instigating an increase in drug use." *York v. Wahkiakum School Dist. No. 200, supra*, Complaint, at ¶ 4.

B. Tecumseh's Drug Problem.

The Policy was implemented by the Board of Education to combat a student drug problem that has existed in Tecumseh since at least the 1970's and has remained a problem through the 1990's. (J.A. 100).

Dean Rogers, the current President of the Board of Education, who is also a parent and grandparent of Tecumseh students, outlined the student drug usage of which she was aware during this period of time. In the 1970's, a band student who offered another band student "pills" was seen by Mrs. Rogers acting inappropriately during a band performance. (J.A. 78). During that same period of time, Mrs. Rogers personally observed students smoking "pot" approximately three times. (J.A. 72). The Chief of Police asked her daughter to look for a certain car because he suspected drug dealing. (*Id.*). She chaperoned a dance where marijuana was found. (J.A. 99). In the late 1970's, Ms. Rogers found marijuana paraphernalia at her house left by a Tecumseh football player. (J.A. 91, 92). Parties were held in the community where marijuana was smoked by her son and fellow Tecumseh students. (J.A. 92). During the 1970's, Ms. Rogers also witnessed an injury to an adult caused by an FFA student in competition who she believed was under the influence of drugs. (J.A. 81).

In the 1980's, Mrs. Rogers was aware that her son's schoolmate was transporting marijuana and was stopped by the police. (J.A. 81, 93). The person who found a bag containing marijuana on school property during that period of time advised her of the incident. (J.A. 93, 94). Her grandson also reported to her a student with beer and another student with a marijuana cigarette at school during that period. (J.A. 94, 95).

In the early 1990's, Mrs. Rogers witnessed a second incident at a competition involving an FFA student where he lost control of his animal which she believes was caused by

drugs. This time the student was hurt. (J.A. 81, 82). During that same time, she was informed that students at a party found the marijuana "stash" of the mother of the student hostess and passed it around to other students at the party. (J.A. 95). In the 1997-98 school year, a student reported to Mrs. Rogers that students were passing a marijuana cigarette around in the classroom. (J.A. 87, 96). She also overheard an FFA student inviting other students to a party where there would be "plenty of smoke," which she understood to mean marijuana. (J.A. 96). During that same year, Mrs. Rogers' granddaughter reported to her that a boy was "bombed out" in class. (*Id.*). Marijuana was also found in a student's car during that same school year. (J.A. 98, 99).

Mrs. Rogers is not the only person to observe or be aware of drug use at Tecumseh. Danny Sterling, the FFA teacher and coach, estimates that in the last five years approximately ten of his students per year in the curricular class associated with FFA appear to be under the influence of drugs. (J.A. 120). He has occasionally overheard students in his FFA class openly talk about drug use. (J.A. 120, 121).

Carolyn Daugherty, the Vocal teacher and coach, has had students tell her other students in choir were using drugs and has observed student choir members who appear to be under the influence of drugs. (J.A. 125, 126).

Sheila Evans, the FHA coach and teacher, believes Tecumseh has a drug problem which has increased over the years, and she is amazed that in her FHA class "kids will talk about use of marijuana quite freely in class" to the extent that she must admonish them. (J.A. 115, 116).

In a period that spanned three years in the late 1990's, Julie Dawson, Russ Rutledge and Ruth Clouber, the counselors of the middle and high schools, have counseled students on numerous occasions regarding their current or past drug use, or the use of such drugs by the students' friends or parents.

(J.A. 52-56). The counselors indicated that three instances involved students in Band, and three instances involved students in Vocal. (*Id.*).

James Blue, the high school principal, has suspected drug usage by students who were brought to the office due to surveillance by the interdiction canines, based upon the odor of marijuana on their clothes and the physical appearance of those students. (J.A. 52,103). Students enrolled in Athletics, FFA, Vocal and Band in the middle school and students enrolled in high school FFA, FHA and Athletics have been caught with or disciplined for drugs. (J.A. 44). Moreover, just prior to the implementation of the Policy, members of the Board of Education began receiving phone calls from or were stopped on the street by parents and grandparents who expressed their concern about drug usage by students. (J.A. 85-88). One brave parent appeared before the Board of Education in an open meeting in February 1998 and publicly admitted her own child's drug abuse. (J.A. 86, 87). A further indication of a problem causing concern was the increase of disciplinary actions over the past five years. (J.A. 57, 64).

Respondents themselves acknowledge that in the 1996 or 1997 school year a group of eighth grade football players was accused of consuming prescription drugs, and in the following year a small quantity of marijuana was discovered in the middle school locker room (J.A. 11, 12). Respondents also conceded that during that same school year, the "drug dog" found three marijuana cigarettes near the boundary of Tecumseh's unfenced parking lot, and also hit on a student car at school within which marijuana particles and seeds were found. (R., Plaintiffs' Brief in Support of Motion for Summary Judgment filed December 28, 1999, page 16). Shortly after this lawsuit was filed, Respondent Lindsay Earls appeared on national television and advised Charlie Gibson on "Good Morning America" that a widespread drug problem existed in Tecumseh. (J.A. 108). She later testified in her deposition that she was unsure whether or not the drug

problem was widespread after conferring with her friends. (J.A. 108, 109). Moreover, Respondent Daniel James, who had been enrolled in Tecumseh a little more than eighteen months when this lawsuit was filed, had been to two or three parties where he had "physically seen about 12 people, altogether, that attend Tecumseh High School, under the influence of illegal drugs." (J.A. 123). During his limited time in Tecumseh, Respondent James also talked to twelve students about their own drug use, half of which he believed were engaged in extracurricular activities. (J.A. 122, 124). He knew of two students who had been sent to drug rehabilitation programs during the eighteen months he was enrolled in Tecumseh. (J.A. 123). Respondent James knew that Tecumseh students "who hang out at the park" adjacent to the high school "do drugs." (J.A. 124).

C. Other Measures Implemented by Tecumseh to Combat Drug Usage.

Tecumseh has attempted to deter and eliminate drug abuse by its students in numerous ways. As noted by the district court below, Tecumseh yearly observes "Red Ribbon week" during which student anti-drug rallies are held, and educational programs which utilize "victim impact" speakers and the anti-drug "Grim Reaper" program have been implemented. *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist.*, 115 F.Supp. 1281, 1286, fn. 20 (Pet. App. D 59a). A "Life Guides" program is utilized in which selected Tecumseh students counsel middle school students about drug use (J.A. 22). The Board of Education also contracts with canine contraband detection companies on a yearly basis to regularly search school property. (J.A. 102). Tecumseh has been provided a city police officer to patrol the high school during class hours (R., Pp. 190 and 193 of Deposition of James Blue, Ex. E to Defendants' Brief in Support of Motion for Summary Judgment filed November 17, 1999), and has installed surveillance cameras in the high schools. (*Id.*).

Tecumseh's efforts have failed to eliminate the drug problem among its students and, as evidenced by the increase in disciplinary actions and observations of Sheila Evans, the drug problem appeared to some to have been on the rise.

As an added tool, the Board of Education began discussing the feasibility of a drug-testing policy during the 1994-1995 school year. (J.A. 84). On August 31, 1998, the Board of Education convened a special meeting for the purpose of seeking input from the community regarding a proposed drug testing policy. (J.A. 86, 87, 136). Approximately fifty patrons appeared at the meeting (J.A. 156). At the meeting, questions were raised by the public regarding the feasibility of testing all students in the District and including all extracurricular activities. (J.A. 136, 137). However, not one patron of the community, including Respondent Lori Earls who was present, voiced disagreement with a drug testing policy. (J.A. 156). After discussion, the Board of Education determined to adopt a policy covering all interscholastic competitive activities. (J.A. 139). The Board officially voted to adopt the Policy on September 14, 1998 and the Policy was implemented on October 19, 1998. (J.A. 156).

D. The Policy.

The Policy covers all Competitive Activities offered by the Board of Education which are regulated by the OSSAA. (J.A. 105, 157). The Policy is non-punitive in nature. (J.A. 193). Although there are consequences for students who test positive under the program, no academic sanctions are imposed nor is any student subject to suspension from school as a result of a violation. (*Id.*).

For the first offense, a meeting is held with the affected student, parent, athletic director and principal. (J.A. 201). The student may continue to compete if the student agrees to drug counseling and further agrees to submit to a drug test within two weeks. (*Id.*).

If the student tests positive a second time during the school year, the student will not be permitted to engage in Competitive Activities for fourteen days. (*Id.*). By agreeing to complete four hours of substance abuse education/ counseling provided by the school and to be randomly tested for the remainder of the year, the student can return to Competitive Activities. (*Id.*). Any student who disagrees with the outcome of the test may appeal the results to the Superintendent and will be permitted to remain in his chosen Competitive Activities until the appeal is heard. (J.A., 200, 202). Moreover, a student who admits drug usage prior to notification of testing will continue to remain in Competitive Activities if the student agrees to the provisions of counseling and a two-week retest. (J.A. 202). Finally, a student who refuses the drug test or who tests positive for the third time in one school year will be prevented from engaging in Competitive Activities for the remainder of the school year or the remainder of a semester in a school year, whichever is longer. (*Id.*).[4] The reasoning behind the Board of Education's implementation of the Policy is clearly expressed:

> "Tecumseh Public Schools is committed to cooperating with parents/guardians in an effort to help students avoid illegal drug use. The Tecumseh Public School District believes accountability is a powerful tool to help some students avoid using drugs and that early detection and intervention can save lives." (J.A.202).

All students who participate in Competitive Activities are tested as part of a required annual physical for athletes or prior to participation for the non-athletic Competitive Activities. (J.A.196). Students may also be tested when

[4] Respondents argued in the district court that, by its plain reading, the Policy covers all extracurricular activities offered by the Board of Education. However, Respondents acknowledged in their initial Complaint that the Policy is not applied, and was never intended to apply, to all extra-curricular activities. (J.A. 20-25). Respondents did not raise this argument in the Tenth Circuit.

reasonable suspicion exists or if the student is chosen on a random basis to provide a sample. (*Id.*). If the student chooses to engage in Competitive Activities, both the student and the student's parents are required to sign a form consenting to all testing under the Policy. (J.A. 196, 197).

The annual and random testing screens for amphetamines, cannabinoid metabolites, cocaine, opiates, barbiturates and benzodiazepines. (J.A. 70). The suspected use of all other controlled, dangerous substances and of unauthorized or excessively used prescription drugs is tested under the reasonable-suspicion provision of the Policy. (J.A. 141).

The test specimen is collected in a "manner designed to minimize intrusiveness . . . ." (J.A. 198). The urine sample is produced by a student in "a restroom or other private facility behind a closed stall." (*Id.*). A monitor accompanies the student to the bathroom and waits outside the bathroom stall. (J.A. 199).

The sample is sent to Drugs of Abuse Testing Laboratory, Inc. in Tulsa, Oklahoma, for testing. (J.A.70). An initial positive test is confirmed by a second and different test conducted on the same specimen. (J.A. 199). Test results are kept in files separate from the student's other educational records. (J.A. 200). Positive tests are disclosed to the parent, student, principal/athletic director and the coach of the activity. Law enforcement authorities are not contacted. (J.A. 199, 200).

II. THE RULING OF THE DISTRICT COURT.

This case was filed in the United States District Court for the Western District of Oklahoma in August 1999. John and Lori Earls and Leta Hagar, the parents of Lindsay Earls and Daniel James, alleged in the Complaint that Oklahoma students have the right to a free, public education, and the right to participate in non-athletic student activities without being required to submit to suspicionless testing under the

Fourth Amendment to the United States Constitution. (J.A. 7). They sought preliminary and permanent injunctions against Tecumseh and a declaration that the Policy, only as it applies to the suspicionless testing of students engage in the enumerated non-athletic competitive activities, violates the Fourth Amendment. (J.A. 28). The allegations were based, in part, on the misperception that a violation of the Policy results in expulsion from the curricular classes associated with the competitive activity.[5] (J.A. 8, 9, 15, 16, 17, 18, 19, 28).

Being presented with cross-motions for summary judgment, the district court concluded that the Policy was constitutional and granted judgment in favor of the Board of Education.

The district court balanced the privacy interests of the students engaged in Competitive Activities against Tecumseh's need and purpose for the drug-testing program, the standard adopted by this Court in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) ("*Vernonia*"). *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist.*, 115 F.Supp. 1281, 1283 (Pet. App. D. at 53a). The court found Tecumseh had demonstrated a "legitimate cause for concern" of substance abuse. The district court declined to interpret *Vernonia* as requiring Tecumseh to demonstrate a drug epidemic as Respondents urged, observing that "[i]t would seen rather anomalous to require school officials to await an epidemic before taking preemptory measures." *Id.*, 151 F.Supp. at 1288 (Pet. App. D at 62a). Regarding the privacy expectations of the students, students voluntarily engaged in non-athletic competitive activities were properly found by the

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[5] This misperception by Respondents was reduced at the court of appeals stage of this proceeding to a similarly misperceived allegation that Respondents would be denied the opportunity to earn the right to "extra credits" in the curricular courses associated with the Competitive Activities.

court to be regulated by more school-sponsored rules and regulations, to be subject to additional non-district rules and regulations, and to compromise their personal privacy comparable to that of athletes stating: "students who elect to be involved in school activities have a legitimate expectation of privacy that is diminished below that of the already lowered expectation of non-participating students." *Id.*, 115 F.Supp. at 1290 (Pet. App. D at 66a). The district court concluded that the testing of students who desire to participate in interscholastic competition is a reasonable means adopted by Tecumseh in its attempts to eliminate and further deter drug use in light of the diminished privacy expectations of those students and the minimal intrusion of the collection process utilized. *Id.*, 115 F.Supp. at 1296 (Pet. App. D at 78a).

III. THE RULING OF THE COURT OF APPEALS.

Respondents appealed to the United States Court of Appeals for the Tenth Circuit which reversed the district court judgment and held the Policy unconstitutional under the Fourth Amendment. *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist.*, 242 F.3d 1264, 1278 (Pet. App. A at 24a-25a). Rather than accepting the analysis utilized by the district court, the court of appeals performed its own balancing of the privacy interests of the affected students against the nature of the concern of the Board of Education. It concluded that, although students in Competitive Activities have a privacy expectation that is diminished below that of the general student population, the Board of Education had not proved a concern that was specifically tailored to the students in Competitive Activities. Finding the Board of Education's concern and purpose of deterrence to be insufficient,[6] its belief of the existence of drug usage to be "hearsay" and

[6] *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., supra*, 242 F.3d at 1276 (Pet. App. A at 22a).

"anecdotal,"[7] its concern for the safety of these students to be "too much and too little,"[8] and the limited supervision it can provide these students an "imperfect match" while engaging in Competitive Activities,[9] the court of appeals concluded the Policy was unconstitutional.[10] Its broad ruling applies to all school activities in all school districts within its jurisdiction:

> "Any district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem."[11]

SUMMARY OF ARGUMENT

Tecumseh's Policy requiring students who choose to engage in Competitive Activities to submit to suspicionless drug testing does not violate the Fourth Amendment to the United States Constitution. This Court has consistently held that the school environment presents special needs which necessitate the relaxation of the Fourth Amendment requirements of the issuance of a warrant based on probable cause.

Tecumseh has the authority and responsibility, as the tutor and guardian of its students, to ensure that the health and safety of its children are safeguarded at all times while they are in the custody of school officials. *Vernonia, supra.*

In particular, the suspicionless drug testing of students engaged in interscholastic athletics has been upheld on the

[7] *Id.*, 242 F.3d at 1274 (Pet. App. A at 17a).

[8] *Id.*, 242 F.3d at 1277 (Pet. App. A at 23a).

[9] *Id.*, 242 F.3d at 1277 (Pet. App. A at 24a).

[10] *Id.*, 242 F.3d at 1278 (Pet. App. A at 25a).

[11] *Id.*

basis that the governmental interest in deterring and eliminating drug use by its children outweigh the diminished privacy interests of students who voluntarily choose to engage in athletic activities which require heightened regulations and privacy intrusions than to which the general student population is subject.

Like athletes, students who engage in non-athletic competitive activities voluntarily choose to abide by heightened regulations and agree to submit to additional privacy intrusions than do students in the general school setting. Moreover, these students spend longer hours in the custody of the school officials, either practicing after school or on weekends, or traveling to different towns, cities and states to compete, where direct supervision by Tecumseh personnel is limited.

The Policy has as its purpose and goal to deter drug use and obtain treatment for those students who use drugs. The Board of Education has reasonably determined that there is a drug problem among its students that warrants the implementation of the Policy. Such determination by the Board of Education to implement the Policy directed at students engaged in Competitive Activities is a proper exercise of its considered judgment and is therefore constitutional.

ARGUMENT

I. THE NATURE OF THE SCHOOL ENVIRONMENT IS RECOGNIZED AS ONE WHICH REQUIRES A RELAXATION OF RIGHTS AFFORDED BY THE U. S. CONSTITUTION

As early as 1953, this Court recognized that the education of our children "is perhaps the most important function of state and local governments." *Brown v. Bd. of Education*, 347 U.S. 483, 493 (1954) ("*Brown*").

In *Brown*, this Court emphasized:

> "Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Id.*

In *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), this Court acknowledged that courts cannot intervene in the resolution of conflicts in the daily operation of schools unless basic constitutional rights are "directly and sharply" implicated.

Although recognizing that students do not "shed their constitutional rights . . . at the schoolhouse gate," this Court shortly thereafter affirmed the *Epperson* reasoning that school officials have the comprehensive authority "to prescribe and control conduct in the schools." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 507 (1969).

This Court understands that "[e]ven in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of school children, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." *New Jersey v. TLO*, 469 U.S. 325, 339 (1985) ("*TLO*").

Special care has been taken to understand the unique and unusual situation in which educators and their governing boards are placed because "[t]he system of public education that has evolved in this nation relies necessarily upon the discretion and judgment of school administrators and school board members." *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

Although educators are government actors, this Court's sensitivity to their situation exists because:

> "[L]ocal control of education involves democracy in a microcosm. In most public schools in the United States the parents have a large voice in running the school. Through participation in the election of school board members, the parents influence, if not control, the direction of their children's education. A school board is not a giant bureaucracy far removed from accountability for its actions; it is truly 'of the people and by the people.' A school board reflects its constituency in a very real sense and thus could not long exercise unchecked discretion . . . ." *Board of Educ., Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 583, 891 (1982) (Burger, C.J., dissenting).

Based on this understanding, this Court consistently finds that the full panoply of constitutional rights do not apply with the same force and effect to students in the school environment as it does to adults in general. *Goss v. Lopez*, 419 U.S. 565, 591 (1975) ("*Goss*").

In *Goss*, this Court first held that students facing a short-term deprivation of their property right to an education are entitled to only the "rudimentary" protections of the Due Process Clause of the Fourteenth Amendment, without the benefit of counsel and the rights of confrontation, cross-examination, and the presentation of witnesses. *Id.* at 583. This Court acknowledged the dilemma in which school officials are placed because they "frequently act on the reports and advice of others." *Id.* at 580.

In *Ingraham v. Wright*, 430 U.S. 651, 671 (1977), this Court held that the Eighth Amendment to the United States Constitution which protects citizens against cruel and unusual punishment is inapplicable to teachers or administrators, as government actors, who impose disciplinary corporal punishment on students. This Court further found that students are

not constitutionally entitled to notice or a hearing prior to the imposition of such punishment because such a process would "require time, personnel and a diversion of attention from normal school pursuits." *Id.* at 681.

More recently in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), this Court recognized that First Amendment rights of students "are not automatically coextensive with the rights of adults in other settings . . . and must be applied in light of the special characteristics of the school environment." (*Id.* at 266). Although not legally obscene, educators are permitted to restrain speech which is "wholly inconsistent with the fundamental values of public school education" and "the determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board [citation omitted] rather than the federal courts." *Id.* at 267.

The relaxation of the requirements of the Fourth Amendment in the school setting, which is the subject of this action, is fully explained below.

II. A RELAXATION OF RIGHTS AFFORDED BY THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Searches Based on Individualized Suspicion in a Special Needs Environment.

The Fourth Amendment to the United States Constitution provides our nation with the constitutional right to privacy. "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *TLO*, *supra*, 469 U.S. at 335.

In *TLO*, this Court created an exception to the warrant and probable cause requirements of the Fourth Amendment for school officials.

T.L.O., at the time a 14-year-old student, and another student were found smoking in the school bathroom. The teacher who discovered the school infraction brought T.L.O. and her companion to the principal's office. Upon questioning by the assistant principal, T.L.O.'s companion admitted the infraction; however T.L.O. not only denied the alleged bathroom incident, but denied that she smoked. The assistant principal conducted a search of T.L.O.'s purse based solely upon the report of the teacher. The search of T.L.O.'s purse not only yielded a pack of cigarettes, but cigarette rolling papers, a pipe, a number of empty plastic bags, marijuana, a large amount of money, a list of students who owed T.L.O. money, and letters that implicated her in drug dealing. *Id.* at 328. The New Jersey Supreme Court ruled that the search of T.L.O. was unreasonable, and hence unconstitutional, partly because the assistant principal had not been furnished specific information to suspect that T.L.O.'s purse would contain cigarettes. *Id.* at 331.

This Court had little trouble determining that a school search is covered by the Fourth Amendment. *Id.* at 337. First and foremost and consistent with its first phrase of the Amendment, the Fourth Amendment permits only those searches that are reasonable. This Court affirmed the earlier standard it developed to determine the reasonableness of a search by "balancing the need for the search against the invasion which the search entails." *Id.*, citing *Camara v. Municipal Court*, 387 U.S. 523, 536-537 (1967).

The balancing test conducted by this Court was not directed specifically at T.L.O. and the need of the assistant principal to conduct the search. Rather, the Court balanced the interest of students, in general, to bring to school personal private items such as keys, money, items of personal hygiene, photographs and diaries against the general "substantial interest of teachers and administrators in maintaining

discipline in the classroom and on school grounds," coupled with the fact that drug usage among students had become a major social problem. *TLO, supra*, 469 U.S. at 339.

This Court then turned to the second phrase of the Fourth Amendment which traditionally defines a reasonable search, *i.e.*, the issuance of a warrant based on probable cause. By weighing both the students' interest in privacy against the educators' substantial interest in maintaining order, this Court dispensed with the warrant requirement finding it "unsuited to the school environment" because "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Id.* at 340. This Court further found that school officials were not required to adhere to the strict standard of probable cause and modified the standard to "depend simply on the reasonableness, under all the circumstances, of the search." *Id.* at 341.

The specific search of T.L.O. was then reviewed by the use of the reasonableness standard. This Court noted that the state court viewed the information the assistant principal relied upon to determine a search was justified was "at best . . . 'a good hunch'" that cigarettes might be found in her purse. *Id.* at 344-345. However, this Court recognized such information was "the sort of 'common sense conclusion about human behavior' upon which 'practical people'—including government officials—are entitled to rely." *Id.* at 346, citing *United States v. Cortez*, 449 U.S. 411, 418.

TLO emphasized "the special characteristics of elementary and secondary schools that make it unnecessary to afford students the same constitutional protections granted adults and juveniles in the nonschool setting."[12] The "special relationship between teacher and student,"[13] a school's

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[12] *TLO, supra*, 469 U.S. at 348 (Powell, J., concurring).

[13] *Id.* at 349 (Powell, J., concurring).

"obligation to protect pupils," [14] and "because drug use and possession of weapons have become increasingly common among young people," [15] mandate the relaxation of the Fourth Amendment's requirement of a warrant based on probable cause to the requirement of simple reasonableness. Justice Blackmun, in his concurring opinion, originated the concept of "special needs" to explain this necessary relaxation of the Fourth Amendment in the school setting.[16] The standard adopted by the *TLO* Court to determine if the search of a student is reasonable ("the individualized suspicion standard") is (1) whether the action was justified at its inception and (2) whether the search was reasonably related in scope to the circumstances which justified the interference in the first place. *TLO, supra*, 469 U.S. at 341.

However, this Court noted this standard did not necessarily extend to suspicionless searches, stating:

> "Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.' *Delaware v. Prouse*, 440 U.S. 648, 654-655, 99 S.Ct. 1391, 1396-1397, 59 L.Ed.2d 660 (1979) (citation omitted)." *TLO, supra*, 469 U.S. at 342, footnote 8.

Since that ruling and prior to *Vernonia*, both the special needs doctrine and the individualized suspicion standard have been applied to the government as an employer to search an individual employee's desk in *O'Connor v. Ortega*, 480 U.S. 709 (1987). This Court found the "special needs" of the public government office environment required a relaxation

[14] *Id.* at 350 (Powell, J., concurring).

[15] *Id.* at 352-353 (Blackmun, J., concurring).

[16] *Id.* at 352 (Blackmun, J., concurring).

of the warrant and probable cause requirements of the Fourth Amendment. *Id.* at 422-425. This Court, however, remanded the case to the district court because of its failure to determine "the justification for the search" and "the reasonableness of the search and scope."

The special needs doctrine and the individualized suspicion standard was again utilized for a search of an apartment of an individual on probation in *Griffin v. Wisconsin*, 483 U.S. 868 (1987). This Court found that "[s]upervision, then, is a 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large." *Id.* at 876. The search in *Griffin* met the individualized suspicion standard based on secondhand information from a police detective to a probation supervisor that "there were or might be guns"[17] in the apartment, *i.e.*, the search was justified at its inception based on common sense reasonableness and related in scope to the circumstances.

B. Suspicionless Searches in Non-School "Special Needs" Environments.

In *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 (1989) ("*Skinner*"), the standard to apply for the suspicionless searches of adult railroad workers was at issue. The Federal Railroad Administration implemented the program based on information collected that indicated railroad employees generally engaged in frequent drug and alcohol use. This Court first employed the "special needs doctrine" and found that "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, 'likewise presents special needs' beyond law enforcement that may justify departures from the usual warrant and probable-cause requirements." *Id.* at 620. This Court reit-

[17] *Griffin v. Wisconsin, supra*, 483 U.S. at 871.

erated its recognition in *TLO* "that a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable." *Id.* at 624.

Individualized suspicion is not required "where the privacy interests implicated by the search are minimal, and where the governmental interest furthered by the intrusion would be placed in jeopardy by the standard of individualized suspicion." *Id.* The railroad employees were found to have a diminished privacy interest "by reason of their participation in an industry that is regulated pervasively to ensure safety." *Id.* at 627. This diminished expectation of privacy was weighed against the government's important interest in identifying and deterring drug use among those adults who are employed in safety-sensitive positions. *Id.* at 633. The scale was balanced in favor of the government.

Thus, the test for searches not based on individualized suspicion emerging from *Skinner* is to first determine if the environment presents a special need to dispense with the warrant and probable cause requirements of the Fourth Amendment and, if so, to balance the privacy interests of the individuals in question against the governmental purpose and interest involved.

The special needs/balancing test was utilized in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) ("*Von Raab*"), a case involving a suspicionless drug testing program implemented by the government as an employer. The sole purposes of the program, which were to "deter drug use among those eligible for promotions to safety sensitive positions within the (Customs) Service and to prevent the promotion of drug users to those positions" were found by this Court to sustain a special need to dispense with a warrant and probable cause. *Id.* at 666. Although the Commissioner of Customs admitted the Service was "largely" drug-free, this Court found the employees to have diminished expectations of privacy due to the nature of their position, and "cannot

reasonably expect to keep from the Service personal information that bears directly on their fitness." *Id.* at 472. On the other side of the scale, the government interest in "ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment" (*Id.* at 670), and the public interest which "demands effective measures to prevent the promotion of drug users to positions that require the incumbent to carry firearms, even if the incumbent is not engaged directly in the interdiction of drugs" (*Id.*), balanced the scale in favor of the government to justify the suspicionless drug testing program for those employees.

In both lower courts, Respondents vehemently argued that this Court's more recent decision in *Chandler v. Miller*, 520 U.S. 305 (1997) ("*Chandler*") was the controlling case to determine the constitutionality of Tecumseh's Policy. Both lower courts declined to agree with Respondents.

Chandler addressed the constitutionality of a Georgia statute requiring all candidates for a large array of public offices to undergo a one-time suspicionless drug test at a time and date designated by the candidate. Under the challenged law, the candidate was banned from nomination or election for failure to obtain a positive drug test. *Id.* at 312.

The State of Georgia "readily acknowledged" that it had no evidence of "any fear or suspicion" of drug use to prompt the adopt of the legislation. *Id.* at 319. The sole purpose of the statute was to "deter unlawful drug users from becoming candidates and thus stop them from attaining high state office." *Id.* at 318. Relying on *Skinner*, *Von Raab* and the *Vernonia* decision discussed below, this Court reaffirmed the need of the government to be "important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Id.* at 318. In the absence of any evidence of drug use, coupled with the fact that the

statute was "not well designed"[18] to identify drug users or deter drug users from seeking office, this Court found no basis to support the statute, noting that fostering an image of drug-free candidates was not enough to demonstrate the necessity for such procedure.

This Court applied the "special needs" test again earlier this year in *Ferguson v. Charleston*, 532 U.S. 67, 121 S.Ct. 1281 (2001) ("*Ferguson*"). This Court noted that "in limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when 'special needs' other than the normal need for law enforcement provide sufficient justification. *Id.*, 121 S.Ct. at 1287, footnote 7. Finding the central feature of the suspicionless drug-testing policy of the City of Charleston to be "the use of law enforcement to coerce the patients into substance abuse treatment"[19] or face arrest, this Court struck the program as violative of the Fourth Amendment.

The Court noted, however:

> "The use of an adverse test result to disqualify one from eligibility for a particular benefit, such as a promotion or an opportunity to participate in an extracurricular activity, involves a less serious intrusion on privacy than the unauthorized dissemination of such results to third parties." *Id.*, 121 S.Ct. at 1288, footnote 12.

C. Searches Not Based On Individual Suspicion In the "Special Needs" School Environment.

Subsequent to *Von Raab* and *Skinner*, but prior to *Chandler* and *Ferguson*, this Court returned to the school setting to consider suspicionless searches of students in *Vernonia*. The challenged policy required the suspicionless drug testing for all students wishing to participate in athletics. The purpose of

[18] *Chandler, supra*, 520 U.S. at 319.

[19] *Ferguson, supra*, 121 S.Ct. at 1290.

the policy was "to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with an assistance program." *Vernonia, supra*, 515 U.S. at 650. The program tested for amphetamines, cocaine and marijuana. Approximately 60-65% of secondary students and 75% of elementary students participated in athletics in Vernonia and were subject to the program. *Acton v. Vernonia*, 796 F. Supp. 1354, 1356, (D. Or., 1992).

No evidence of actual use of amphetamines, cocaine or marijuana on school grounds by either the student population generally or student athletes specifically was presented to this Court. Rather, the testimony at trial in the district court came from teachers who overheard the student body, in general, boasting about the use of "drugs," and who were facing profane, rude and obscene language in the class. One instance of a teacher observing students using drugs off school property was offered. *Id.* There was also testimony by the administrators who were experiencing an unusual increase in disciplinary referrals in the general student population and who had a "perception," confirmed by the perceptions of parents and students, that those problems were caused by "substance" abuse. *Id.* at 1357. The athletes were not insulated from the perceived substance problem. Although no athlete was caught or observed at school in possession of amphetamines, cocaine or marijuana,[20] some athletes had consumed alcohol on a bus, and a wrestling coach smelled the odor of marijuana in the hotel room the day after an athlete was injured in a competition. *Id.* The coach further testified that the injury to the wrestler and safety omissions and misexecutions by football players fostered his "belief" that athletes did drugs. *Vernonia, supra*, 515 U.S. at 649.

[20] Although not mentioned in any of the *Vernonia* opinions, during the three years the drug-testing policy was in effect there only two students tested positive for drug use. Respondent's Brief at 7, *Vernonia, supra*, (No. 94-590) (filed February, 1995).

This Court reiterated in *Vernonia* that the "special needs" of the general school setting requires school officials to have greater flexibility under the Fourth Amendment because a warrant based on probable cause would "undercut" the substantial need of freedom for school officials to maintain order in the schools. *Id.* at 653.

Finding already existing special needs in the school setting, the *Skinner* and *Von Raab* balancing test was utilized by weighing the privacy interests involved against the nature of the governmental concern.

On the privacy side, students in general are subjected to a greater degree of control and supervision by school officials, who act as their guardians and schoolmasters. Students are placed by their parents in the temporary custody of the school officials who, for many purposes, act in *loco parentis*. *Id.* at 654. This tutorial and custodial nature coupled with the usual physical examinations and vaccinations required of students, led this Court to affirm that "students within the school environment have a lesser expectation of privacy than members of the population generally." *Id.* at 657.

Student athletes were found to have even less legitimate privacy expectations than the general student population, first, because of the element of communal undress involved in athletics. Athletes require "suiting up" before each practice or competition, and afterwards shower and change in the locker room. *Id.* Secondly, by "going out for the team," the athletes voluntarily subject themselves to a degree of regulation even greater than imposed on the general student population. *Id.* They submit to a pre-season physical exam, acquire or waive insurance, maintain academic eligibility, and comply with rules of conduct, dress, and scheduling dictated by their coaches. *Id.* This Court analogized athletes who voluntarily participate in sports to adults who choose to

participate in a closely regulated industry to similarly "have reason to expect intrusions upon normal rights and privileges, including privacy." *Id.*

The character of the privacy intrusion was likewise held negligible where fully clothed male students produce the sample at a urinal with an adult observer standing behind and fully clothed female students produce samples in a stall with a monitor outside the stall. This Court found "[t]hese conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially schoolchildren use daily." *Id.* at 658. Furthermore, the invasion of privacy is also insignificant by a process where only certain drugs are tested, where the results are disclosed to a limited number of personnel, and where the possibility of advance disclosure of medications the students were taking exists. *Id.* at 658-660.

Finding the legitimate privacy interests of student athletes to be minimal, this Court turned to the nature of the concern expressed by the school officials in drug testing its athletics. This Court refused to describe the interest required under the Fourth Amendment to justify such searches as "a fixed, minimum quantum of governmental concern." *Id.* at 661. The interest of the officials, instead, must be "an interest which appears *important enough* to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy." *Id.* (Emphasis supplied by the Court.)

The profound nature of the concern of school officials to deter drug use among the children under their care was aptly recognized by this Court:

> "That the nature of the concern is important-indeed, perhaps compelling-can hardly be doubted. Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the

> Nation's laws against the importation of drugs, which was the governmental concern in *Von Raab, supra*, 489 U.S., at 668, 109 S.Ct., at 1392, or deterring drug use by engineers and trainmen, which was the governmental concern in *Skinner, supra*, at 682, 109 S.Ct., at 1419. School years are the time when the physical, psychological, and addictive effects of drugs are most severe. Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted. In the present case, moreover, the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction." *Vernonia, supra*, 515 U.S. at 661-662.

Finally, this Court found immediacy of the governmental concern present based on the evidence of drug use, noting however that in both *Skinner* and *Von Raab*, no such evidence was presented. *Id.* at 663.

This Court began and ended the reasoning in *Vernonia* by noting that "[c]entral, in our view" and the "most significant element" in the case is the policy was implemented in furtherance of the government's role as guardian, tutor and schoolmaster to children placed in its custody by parents. *Id.* at 654 and 665 The majority opinion concluded by acknowledging the "judgment of Vernonia's parents, its school board, and the District Court, as to what was reasonably in the interest of these children under the circumstances." *Id.* at 665.

Since *Vernonia*, three federal circuits have addressed the suspicionless testing of students. Notwithstanding the ruling by the Tenth Circuit at issue here, the remaining two circuits

have addressed drug testing policies much more expansive than Tecumseh's Policy and recognize a school district's authority and duty to conduct suspicionless drug testing.

In *Todd v. Rush*, 133 F.3d 984 (7th Cir. 1998) (rehearing and suggestion for rehearing *en banc* denied, 139 F.3d 571 (1998)) (cert. denied 525 U.S. 824 (1998)), the Seventh Circuit reviewed the constitutionality of that part of a drug testing policy that applies to all extra-curricular activities. Under the policy, if the student tests positive, the student is barred from participating in any extra-curricular activities until the student subsequently produces a negative test. No evidence was presented to the court that those students involved in extra-curricular activities were the cause of the drug problem in the school district.

The Seventh Circuit heavily relied on the *Vernonia* decision and its earlier decision in *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988). The suspicionless testing policy was found to be implemented in "furtherance of the school districts' responsibilities, under a public school system, as guardian and tutor of children entrusted to its care," and further held that deterring drug use by students is a compelling interest of the state. *Todd v. Rush, supra*, 133 F.3d at 986.

The court found little difference in the testing of athletes than testing students in other extra-curricular activities:

> "Certainly successful extracurricular activities require healthy students. . . .
>
> "Additionally, while recognizing that extracurricular activities 'are considered valuable to the school experience, and [that] participation may assist a student in getting into college,' the district judge noted that extracurricular activities, like athletics, 'are a privilege at the High School' (Op.9). In *Schaill*, this Court found significant 'the fact that [the] plaintiffs are required to submit to random drug testing only as a condition of

participation in an extracurricular activity,' in that case athletics. *Schaill*, 864 F.2d at 1319. *Similar to Schaill* and *Vernonia*, the Rush County Schools' drug testing program applies only to students who have voluntarily chosen to participate in an activity. As the district court also noted, students in other extracurricular activities, like athletes, 'can take leadership roles in the school community and serve as an example to others' (Op. 14). As this Court has reasoned, '[p]articipation in inter-scholastic athletics is a benefit carrying with it enhanced prestige and status in the student community' and thus '[i]t is not unreasonable to couple these benefits with an obligation to undergo drug testing.' *Schaill*, 864 F.2d at 1320. Therefore it is appropriate to include students who participate in extra-curricular activities in the drug testing." *Todd v. Rush, supra*, 133 F.3d at 986.

The Eighth Circuit has also examined the constitutionality of a student drug testing policy which was much more expansive than Tecumseh's Policy. In *Miller v. Wilkes*, 172 F.3d 574 (8th Cir.1999) *(vacated on other grounds)* (*"Miller"*), the policy at issue covered students involved in any activity outside the regular school curriculum, such as the Rodeo Club, school dances and the prom committee. The Eighth Circuit, like the Seventh Circuit, found little difference between the privilege of voluntarily participating in athletics and the privilege of voluntarily participating in any other after-school activity. Although the school presented no evidence of any drug problem in the district, the court of appeals recognized that a school need not wait for a demonstrable problem to occur before implementing pre-ventative testing measures:

> "Drug and alcohol abuse in public schools is a serious social problem today in every part of the country. (Indeed, to the extent any party thinks it necessary to do so, we take judicial notice of that fact. See Fed.R.Evid. 201 (generally known fact).) Perhaps no public school is

> safe from the scourge of drug and alcohol abuse among its students, and it is in the public interest to endeavor to avert the potential for damage, both to students who abuse and to those students, teachers, family members, and others who are collaterally affected by the abuse, before the problem gains a foothold. Even though no harm evidently is yet quantifiable in the Cave City schools, we conclude that 'the possible harm against which the [School District] seeks to guard is substantial.' *Von Raab*, 489 U.S. at 674-75, 109 S.Ct. 1384 *(emphasis added)*. We see no reason that a school district should be compelled to wait until there is a demonstrable problem with substance abuse among its own students before the district is constitutionally permitted to take measures that will help protect its schools against the sort of 'rebellion' proven in Vernonia, 'one fueled by alcohol and drug abuse as well as the student's [*sic*] misperceptions about the drug culture.' *Acton v. Vernonia Sch. Dist. 47J*, 796 F.Supp. 1354, 1357 (D. Or. 1992) *(subsequent history omitted), quoted in Vernonia*, 515 U.S. at 663, 115 S.Ct. 2386. Demonstrating a drug or alcohol problem the severity of which approaches that endured by the Vernonia schools certainly 'would shore up an assertion of special need for a suspicionless general search program.' *Chandler*, 117 S.Ct. at 1303. But we conclude that, given the compelling state interest in discouraging drug and alcohol abuse, and also given the considerable risk of immediate harm once the problem surfaces, the 'nature and immediacy' of the governmental concern provides strong support for the random testing policy at issue in this case. *See Von Raab*, 489 U.S. at 675 n. 3, 109 S.Ct. 1384 (It is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context.)." *Miller, supra*, 172 F.2d at 580.

Even though the Policy at issue here is more circumscribed than the policies in *Todd* or *Miller*, nevertheless it is within

the District's power and authority, in its role as guardian, to determine when its concern for the safety of its children is important enough to implement a drug testing policy.

Since *Vernonia*, two other federal circuits have addressed the special needs of the school environment as it relates to the Fourth Amendment protections of adult employees.

In *Knox County Educ. v. Knox County Bd. of Educ.*, 158 F.3d 361 (6th Cir. 1998) *(cert. den'd.* 528 U.S. 812 (1999)) ("*Knox*") the subject drug-testing policy required suspicionless drug testing for all employees or applicants applying for, transferred to or promoted to "safety-sensitive positions." A safety-sensitive position under the policy included principals, assistant principals, teachers, traveling teachers, teacher aids, substitute teachers, school secretaries and school bus drivers. The Sixth Circuit acknowledged those positions as "safety-sensitive" because those individuals are "entrusted with young children for a prolonged period of time on a daily basis." *Knox, supra,* 158 F.3d at 378. School employees "serve in an *in loco parentis* capacity and are charged with the responsibility 'to secure order and to protect students from harm while in their custody.'" *Id.* at 375. The special needs of the school environment was readily recognized by the Court:

> "We can imagine few governmental interests more important to a community than that of insuring the safety and security of its children while they are entrusted to the care of teachers and administration." *Id.* at 374.

Considering the nature of the school environment, the Sixth Circuit approved the suspicionless drug testing of school employees and applicants, even though no evidence of a drug problem among employees or harm to students by employees under the influence of drugs was demonstrated, stating "we do not believe that the Board must wait passively for a disaster to occur before taking preemptive action to

minimize the risks of such occurrence." *Id.* at 379. To the same effect is the Fifth Circuit's opinion in *Aubrey v. School Board of Lafayette Parrish*, 148 F.3d 559 (5th Cir. 1998).

Undoubtedly, suspicionless drug testing in the school environment poses a different situation where school officials "are faced with pervasive drug use in our schools" *Knox, supra,* 158 F.3d at 375, than the public office situation addressed in *Chandler* or the hospital/law enforcement collaboration in *Ferguson.*

III. THE DISTRICT'S DRUG TESTING POLICY IS CONSTITUTIONAL

Based on *TLO* and *Vernonia*, it is uncontradicted and undisputed that Tecumseh, by its very nature as a public school, necessitates the relaxation of the Fourth Amendment requirement of the issuance of a warrant based on probable cause to conduct a search. This special need exists because these school officials are the guardians, tutors and schoolmasters of the children of Tecumseh residents who have placed their children in the temporary custody of the officials. The residents of Tecumseh expect and demand these officials to maintain order and to protect their children from danger. Since the issue at hand is the suspicionless search of a segment of the Tecumseh student population, the reasonableness of this search is determined by balancing the privacy interests of the affected students against the nature and immediacy of Tecumseh's concern and the efficacy of the means utilized to address the concern.

A. The Legitimate Expectation of Students Engaged in Interscholastic Competition is Diminished to a Greater Degree Than the Already Diminished Privacy Expectations of the General Student Body.

The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes

as legitimate. *Vernonia, supra*, 515 U.S. at 654, citing *TLO, supra*, 469 U.S. at 338.

TLO and *Vernonia* have solidified the doctrine that all children enrolled in the District and all other public school districts have a lesser legitimate expectation of privacy than the general adult population by virtue of their status as students. Whether or not this lessened privacy interest, standing alone, is sufficiently diminished to permit suspicionless drug testing of the entire student population was not addressed in *Vernonia* and is not at issue here, since the policy is directed to only eight of the numerous student activities offered students by the Board of Education.

The students who participate in Competitive Activities voluntarily do so. In order to compete with other school districts, or in state, regional and national competitions, the students who engage in these activities travel to other towns, cities and states. As revealed by Respondent Earls, such trips have lasted up to four or five days. (J.A. 111, 113). At times, these students have been required to sleep with forty-to-fifty other students in a one-room dormitory setting with only public-like restroom facilities available for dressing and undressing. (J.A. 109-111). On other trips, some more modest students have ingenuously discovered how to disrobe in and out of their choir uniforms on a school bus full of other students. (R., Ex. A, Deposition of Carolyn Daugherty, p. 56, to Volume I of Plaintiffs' Appendix regarding Motion for Summary Judgment filed December 28, 1999). The Competitive Activities at Tecumseh "are not for the bashful." *Vernonia, supra*, 515 U.S. at 657.

The court of appeals declined to give this aspect of privacy "much" weight in its balancing of the interests at stake in this case, doubting that this Court in *Vernonia* intended the privacy interest of a student to be dependent upon the degree to which these students are willing to "dress or shower together or, on occasion, share sleeping or bathroom facilities

while on occasional out-of-town trips." *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., supra*, 242 F.3d at 1275 (Pet. App. A 20a.) While it may be true that this Court did not base its finding of a further diminished legitimate expectation of privacy in *Vernonia* solely on the **degree** of undress of athletes, the fact that there was "an element of communal undress" certainly was an important factor utilized to weigh the legitimate expectation of privacy of the athletes in question who already have diminished privacy interests due to their very status as students. *Vernonia, supra*, 515 U.S. at 657. The reality is that students who engage in Competitive Activities have a more diminished legitimate expectation of privacy due to the element of communal undress involved in those activities.

Furthermore, all students who engage in Competitive Activities, like athletes, "go out for the team" and "voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally." *Id.* Students engaged in Competitive Activities "agree to follow the directives and adhere to the rules set out by the coach or other director of the activity." *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., supra*, 242 F.3d at 1276 (Pet. App. A 21a.). One such rule, required by choir coach Carolyn Daugherty, is that students who wish to compete in a choir event that requires an overnight stay must submit proof of and the identification of medical insurance, their social security number, parental emergency contact and a list of any prescription drugs they are currently taking in the event of an emergency. (J.A. 132). Ms. Daugherty has had occasion to use this information in a hospital emergency room with a student while on an overnight trip. (J.A. 133).

Moreover, while all students are required to abide by the rules of conduct promulgated by the school district, students engaged in Competitive Activities additionally, and voluntarily, subject themselves to the rules and regulations of the OSSAA, a state-wide and non-district organization that

regulates competition. (J.A. 105). Under these regulations, the OSSAA has the power to deem a student ineligible "whose conduct or character outside the school is such to reflect discredit upon the school" and may disqualify a student from further competition for a violation of the game rules developed by the OSSAA. (J.A. 194; R., Exhibit A to Defendants' Brief in Support of Motion for Summary Judgment filed November 17, 1999).

The court of appeals weighed this additional regulation only "in some small way" in its balancing of the interests at stake in this case. *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., supra*, 242 F.3d at 1276 (Pet. App. A 21a). To the contrary, this Court has found these types of regulations provide expectations of privacy intrusions of athletes as another important factor to weigh and which further reduces the legitimate expectation of privacy due to their very status as students. *Vernonia*, supra, 515 U.S. at 657. Similar to the athletes in *Vernonia*, students in Competitive Activities can be analogized to adults who choose to participate in "a closely regulated industry" and who have "reason to expect intrusions upon normal rights and privileges, including privacy." *Id.*

B. The Character of the Privacy Intrusion is Not Significant.

In *Vernonia*, the student entered a locker room accompanied by a monitor of the same sex. The male student produced his sample in an open urinal with his back to the monitor, who may or may not have watched the student urinate while listening for the normal sounds of urination. Female students produced their samples in an enclosed stall, where the monitor could hear but not observe the collection. Students then gave their sample to the monitor who checked it for temperature and tampering and transferred the sample to a vial. The vial was then shipped to the drug testing laboratory for testing. *Id.* at 650.

In this case, Tecumseh students are directed to an on-site facility where they are individually escorted to a restroom by a monitor of the same sex. Both male and female students produce their urine samples in the privacy of closed bathroom stalls while the monitor waits outside the stall. Once the sample is produced, the monitor places the specimen in two separate plastic vials and seals the vials in the presence of the student. The vials are then shipped to the drug testing laboratory in Tulsa, Oklahoma. (J.A. 70). Moreover, the urine collected is only tested for drugs, not for any medical condition, and the results are disclosed to a limited number of personnel.

Tecumseh's procedure for urine collection for female students is identical to the one utilized in *Vernonia* and is much more private than the procedure utilized for its male students. On this issue of privacy, even the court of appeals agreed that "the invasion of privacy was not significant." *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., supra*, 242 F.3d at 1276 (Pet. App. A 22a).

C. The Nature of Tecumseh's Concern is Important Enough to Justify Suspicionless Drug Testing.

The nature of Tecumseh's concern which resulted in the implementation of the Policy is the same concern expressed in *Vernonia*. As guardians of school children for a major part of their waking hours, preventing, eliminating and deterring drug use is a significant responsibility of board members, administrators and teachers in order to maintain an orderly and safe school. The test here is whether or not Tecumseh's officials have an interest which appears important enough to justify the suspicionless searches of students participating in Competitive Activities, in light of the fact that the searches are not significantly intrusive upon the genuine expectation of

privacy of competitive students that is reduced below the already diminished privacy expectations of the general student population. *Vernonia, supra*, 515 U.S. at 661.

As stated previously, this Court in *Vernonia* had little difficulty determining that the overall nature of the State's interest in deterring drug use by students is not only important but perhaps compelling. *Id.* The nature of this interest is magnified when state actors are public school officials who have children in their custody "for whom it has undertaken a special responsibility of care and direction." *Id.* at 662. Finally, a program tailored toward a group of students where a concern for safety is present will be an even greater justification for a search. *Id.*

Once again, whether the overall nature of the State's interest in deterring drug use standing alone is sufficient to justify a suspicionless drug testing program covering the general student population was not addressed in *Vernonia*, and is not at issue here.

The Statement of the Case evidences the history of known drug abuse among Tecumseh students. In both lower courts, Respondents characterized the District's drug problem as *de minimus*. Moreover, Respondents sought in the lower court to exclude all of the evidence presented by the President of the Board of Education, teachers and administrators, except the confirmed positive drug tests and the direct observation by a school official of marijuana in a student's car, on the basis that this evidence is legally inadmissible hearsay. (R., Plaintiffs' Motion In Limine re: Hearsay Evidence of Drug Use And Memorandum of Points and Authorities in Support, filed March 1, 2000).

Respondents objected to this evidence because it "relies on the observations of individuals who have not been identified and who will not testify at trial. Rather, the trial witnesses (or documents) report the statements of absent declarants. This is classic, inadmissible evidence." (*Id.* at page 7). Respondents' objection is motivated by their own admission that the type of evidence presented by the officials "paints a far worse picture of drug use than can be sustained through admissible, verifiable evidence." (*Id.*, at page 8).

Drug use by students in Tecumseh is not a new or recent problem. Substance abuse among its students has been endured by board members, administrators and teachers for a very long time.

The history of Tecumseh's and its drug problem has been told by no one better than the current President of the Board of Education. While attending Tecumseh as a student, she observed students smoking marijuana at school. (J.A. 72). Her daughter, who was attending Tecumseh at the same time, also advised her of drug use. (J.A. 78). She has knowledge of drug use through her son, who has been a substance abuser. (J.A. 92). Throughout the years, Ms. Rogers has been actively involved in student activities and has held offices in the Tecumseh Band Booster Club, the FFA, the Junior High Athletic Booster Club and the High School Athletic Booster Club. (J.A. 90). While attending competitive events, she has witnessed injuries caused by students under the influence of drugs, the last of which occurred in 1991. (J.A. 81, 82). She was elected to the District Board in 1993 and became its President in 1996. (R., Exhibit D, Deposition of Dean Rogers, p. 12, to Defendants' Response in Opposition to Motion for Summary Judgment filed December 28, 1999).

Her grandchildren now attend Tecumseh. They have reported seeing marijuana abuse and a student under the influence of drugs in school. (J.A. 87, 95). Other students' parents and grandparents have also called her to tell her that drugs are present in Tecumseh. (J.A. 85).

Ms. Rogers' knowledge of substance abuse; the pleas to the Board of Education by parents who know their children are using drugs; the open statements made by students in class in

front of their teachers concerning and supporting drug use; administrators' and teachers' observations and knowledge of the odor and comportment of children who have taken drugs; students who have gone through drug rehabilitation programs; the "hits" by the drug dogs; the findings of drugs on the school campus; and the school counselors who were listening to students talk about their drug use and drug use of other students, establish a legitimate cause for concern of drug abuse. This information in the hands of the school officials clearly represents "the sort of common sense conclusion about human behavior upon which practical people—including government officials—are entitled to rely" that a drug problem exists in the Tecumseh school system. *TLO*, *supra*, 469 U.S. at 346. By virtue of their own testimony, Respondents Lindsay Earls and Daniel James admit a drug problem is present in Tecumseh.

Although Respondents may be technically correct that the majority of the evidence brought forth by the school officials is hearsay, in the school setting this Court has consistently held that "a teacher's focus is, and should be, on teaching and helping students, rather than on developing evidence against a particular troublemaker." *Id.* at 353 (Blackmun, J., concurring). The standard by which these school officials determined that a drug problem exists in Tecumseh is in conformity with the standard of which this Court explained "will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense." *Id.* at 343. In this case, reason and common sense leads the Board of Education to the only logical conclusion—a drug problem exists in its school.

Although it ultimately conceded that there was "clearly some drug use at the Tecumseh schools," [21] the Tenth Circuit

[21] Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., supra, 242 F.3d at 1274-1275 (Pet. App. A 17a - 19a).

apparently agreed with Respondents that the vast majority of evidence presented by the Board of Education was "hearsay" and "virtually anecdotal." The contention that members of the Board of Education, administrators and teachers have to personally witness students using drugs in order to be able to determine by their considered judgment and opinions there is a sufficient drug problem warranting a drug policy is untenable. In fact, the evidence proffered here is akin to the evidence properly considered by this Court in *Vernonia*. The wrestling coach there witnessed an injury suffered by a wrestler and various omissions of safety procedures and misexecutions by football players, which the coach believed may have been caused by drug use. Additionally, the administration's concern with the increase in disciplinary problems in general as well as educators' concerns that students were "glamorizing drugs and alcohol" led the administration and board in *Vernonia* to properly and legitimately believe that the students were abusing drugs.[22]

Moreover, since the onset of this litigation, the Board of Education acknowledged that it did not direct the program at the students who engage in interscholastic competition because they are the only students, or even the most likely students,[23] to abuse drugs. The nature of Tecumseh's concern

[22] When it attempted to target the drug problem specifically to students "subject to the testing Policy," the court of appeals found such use "vastly different from the epidemic of drug use and discipline problems among the very group subject to testing in *Vernonia*." *Id.*, 242 F.3d at 1275 (Pet. App. A 19a).

[23] In their Brief in Opposition, Respondents' statements that the "Tenth Circuit found" that "drug testing students who are least likely to use drugs" was unconstitutional (Brief in Opposition, p. 6); the "court further held" that the efficacy of addressing the drug problem of a student group "identified as the least likely to use drugs" is minimal (*Id*, pp. 6,7); the "Tenth Circuit struck down any drug testing" for students "who are the least likely to do drugs" (*Id*, p. 9); and the "Tenth Circuit's decision" that "the students tested have been identified as those not likely to do drugs"

is not based solely upon drug abuse among its students in interscholastic competition.[24] Other concerns which are equally important enough to justify the suspicionless search are clearly present. The nature of those concerns—Tecumseh's concern for the safety of the students while competing and its concern about the limited degree of supervision it can provide its students while in engaged in the Competitive Activities outside of the traditional school setting, coupled with its knowledge of drug use and its concern for deterrence and treatment—are legitimate or "sufficient" reasons for testing students in Competitive Activities.

With regard to safety, the court of appeals faulted Tecumseh because it "tests both too many" students (citing students in FHA as an example of competition where students are not in physical danger) and "too few" students (citing students who use "shop equipment" during classtime). *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., supra* 242 F.3d at 1277 (Pet. App. A 23a).

Tecumseh readily admits that some students engaged in interscholastic competition do not engage in the type of physical competition that endangers their safety. However, *Vernonia* does not require proof that all students covered by a drug testing program must engage in an activity where physical danger is present.[25]

(*Id*, p. 17), are distortions of the Tenth Circuit's decision in the case. The Tenth Circuit did not determine that students engaged in Competitive Activities are the least likely students to use drugs.

[24] As stated by this Court in *Von Raab, supra*, 489 U.S. at 657-658, "[t]he mere circumstances that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity."

[25] The evidence of physical danger in *Vernonia* was limited to football and wrestling. Although not mentioned in any of the *Vernonia* opinions, the policy also covers basketball, track, cross country, volleyball and golf. Brief of Petitioners at 3, *Vernonia* (No. 94-590) (filed January 12, 1995).

Aside from Athletics, which activity Respondents excluded from their challenge, Tecumseh's Policy covers seven other competitive activities. Cheerleading and Pom Pom require students to perform back flips, splits and other acrobatic moves, such as pyramiding on top of each other and dropping one student from the top of the pyramid. (J.A. 75, 76). The Policy covers Band, which requires students to perform extremely precise routines with heavy equipment and instruments in close proximity to other students. (J.A. 49). Moreover, in FFA, students are required to individually control and restrain animals as large as 1500 pounds through the use of voice commands and physical cues such as halters and show sticks. (J.A. 79, 80,118).

The court of appeals viewed these dangers no different than the risk of danger facing a student in a classroom laboratory who is under the influence of drugs. *Id.*, 242 F.3d at 1277 (Pet. App. A 23a). Contrary to that view, however, the classroom is a highly structured environment where the classroom teacher can observe each student and monitor for threats to safety. Police security, drug interdiction canines and surveillance cameras additionally support a teacher during the school day.

Although the remaining Competitive Activities—Vocal, FHA, and the Academic Team—do not present the same type of apparent physical danger as the others, these activities share a common safety thread with the other activities in the area of supervision.

While students are in competition, in transit to and from competitions, often driving their own vehicles, or relaxing in between competitions, the traditional supervision of students by Tecumseh personnel is nearly impossible. "The need for close supervision in the schoolhouse is intensified on field trips where opportunities abound to elude the watchful eye of chaperones." *Desilets v. Clearview Bd. of Education*, 627 A.2d 667, 672 (N.J. Super. A.D., 1993) ("*Desilets*").

Students who participate in Competitive Activities oftentimes practice for competitions after school hours or on weekends. These students often travel to different towns, cities and states to participate in competition, spending one, two or more nights away from home. During those times, the team coach and some volunteers are in charge of supervision of the students, but free time is available for the students to visit students from other schools and to see the sights of the city.

At least one court of appeals has recognized the problem that competition poses when it addressed the search by a school official of a Tennessee student who was competing in a band contest in Hawaii with 140 of her fellow band members. In *Webb v. McCullough*, 828 F.2d 1151, 1157 (6th Cir. 1987), the Court observed:

> "First, the trip did not involve mandated education, as it was a voluntary undertaking on the part of Webb and the other band members, just as most extracurricular activities are voluntary.
>
> . . . .
>
> "Second, a greater range of activities occur during extracurricular activities than during school. Thus, there may be a need for a greater range of intervention by an administrator than is the case when a student is only active within the relatively orderly confines of a school.
>
> "Third, there are many more ways for a student to be injured or to transgress school rules or laws during a non-curricular field trip than during relatively orderly school hours. To expose administrators and school districts to increased tort liability while denying them the authority necessary to lessen the likelihood of student injury would be inequitable and would probably decrease the range of extracurricular activities schools would offer."

Moreover, as the Court in *Desilets* observed:

> "[A] teacher confronted with a serious problem of misbehavior or injury in the schoolhouse readily has available to him or to her substantial resources to deal with the problem, such as other teachers and administrators, a school nurse, and quick access to police and ambulance services, if necessary. On the other hand, chaperones on a field trip are relatively isolated." *Desilets, supra*, 627 A.2d at 672.

The court of appeals dismissed the nature of Tecumseh's concern for limited supervision because it reasoned, first, that the general student population is not closely supervised when they are in the hallways during school hours, at lunch or when entering and leaving school. *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., supra*, 242 F.3d at 1277 (Pet. App. A 23a-24a). Once again, the court of appeals ignored the fact that security personnel, surveillance cameras, and the entire faculty is present during those unstructured times during the school day to provide the needed support to supervise students. These supports are not available to coaches after school, on weekends or when traveling.

Secondly, the court of appeals reasoned that since three non-competitive activity organizations in Tecumseh in the last five years had traveled overnight, the nature of Tecumseh's concern could not be based on the problem posed by limited supervision of the students engaged in Competitive Activities. *Id.*, 242 F.2d at 1277. (Pet. App. A 24a). Tecumseh admits that not all students who ever spent a night in the custody of a teacher or administrator are covered by the Policy.

The nature of the District's concern is not based solely on limited supervision, nor is it based solely on safety, nor is it based solely upon drug abuse, nor is it based solely on deterrence. The nature of the concern in Tecumseh is the deterrence and hopeful elimination of drug use by that part of the student population: 1) who have not been insulated from

drug use;[26] 2) who have already voluntarily placed themselves under more stringent academic and out-of-school rules and regulations; 3) who have a lesser degree of privacy than the general student population; and 4) who, with minimum school supervision, reap the benefits of representing the school district in competitions with students from all over the country[27] and enjoy the privilege offered by the Board of Education to travel and see the world outside of Tecumseh, Oklahoma. None of the other preventative measures implemented by the Board of Education are or can be utilized for these students when they are competing off premises. Moreover, as stated by the district court, the nature of Tecumseh's concern is effectively addressed "by making sure that the large number of students participating in competitive, extracurricular activities do not use drugs.[28]" *Earls v. Bd. of*

[26] As stated by Carolyn Daugherty, commenting about her students who have won state choir awards, "[a]nd you're going to find that a lot of those students don't do drugs, but some do. They may be intelligent but not smart." (J.A. 128). Further, Respondent James, who denied drug usage, lived in a home environment that had been invaded by drugs. (J.A. 121, 122)

[27] Respondents argued in the lower courts that the sole reason for the implementation of the Policy is purely symbolic because school officials listed the importance of representing Tecumseh in competitions as a reason for its implementation. Tecumseh admits representation is a reason, but not the only reason, for directing the Policy to students who voluntarily choose to compete.

[28] Respondents assert that students in choir and academic team are not recognized as role models, generally, in the Tecumseh schools and by testing them, other students would not be deterred from using drugs. Such a characterization is unfounded, and ignores the reality that most students are looked up to by at least a few other students within their peer group. Respondent Daniel James, who characterized himself as a "skater" and not a part of the "popular" crowd, was justifiably very proud of his participation in Life Guides, an organization that existed for the purpose of providing student role models and counselors to other students to avoid drug use. Daniel James considered himself to be a role model, even though he was not involved in athletics. (J.A. 17, 18).

Educ. of Tecumseh Pub. Sch. Dist., supra, 115 F.Supp. at 1295 (Pet. App. A 77a).

D. The Nature of Tecumseh's Concern is Sufficiently Immediate to Justify Suspicionless Testing.

The immediacy of the concern for drug usage is just as great in Tecumseh as is the nature of its concern. Respondents have argued throughout this litigation that under *Vernonia*, "immediacy" requires a sudden increase, a rebellion or an epidemic of drug usage in a public school before random drug testing can be implemented. Logically, if one were to interpret *Vernonia* as Respondents have urged, the degree of drug use required before drug testing could be implemented would be far higher for the student population with diminished Fourth Amendment rights than it would be for adults who enjoy all the rights and privileges under the Amendment.[29]

The district court astutely determined that it was not required under *Vernonia* to weigh the proportion of Tecumseh's drug problem to ascertain whether or not the problem met a standard of "epidemic" or "state of rebellion." *Id.*, 115 F.Supp. at 1285 (Pet. App. D 56a-57a). On this point, the Tenth Circuit agreed.[30] Nonetheless, the Tenth Circuit ignored the *caveat* in *Von Raab* and *Skinner* that suspicionless drug testing policies may be constitutional

[29] The crisis found by this Court in *Vernonia* "is an immediate crisis of greater proportions than existed in *Skinner*" . . . "[a]nd of much greater proportions than existed in *Von Raab*, where there was no documented history of drug use by any customs official." *Vernonia, supra*, 515 U.S. at 663.

[30] "We do not suggest that a school must wait until it can identify a drug abuse problem of epidemic proportions before it may drug test groups of its students." *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., supra*, 242 F.3d at 1278 (Pet. App. A 25a).

when other factors exist to justify the search and instead determined that, in any school activity a "sufficient" number of drug abusing students must be identified in that specific activity before suspicionless drug testing can be imposed. Although an "epidemic" number of students is not by definition analogous to "sufficient," "what appears to be a problem in one place might seem to be a minor annoyance elsewhere." *Acton v. Vernonia,* 23 F.3d 1514, 1519 (9th Cir.1994). Tecumseh believes if it must wait until a "sufficient" number of student drug users can be actually identified in a specific activity, its drug problem will have reached the epidemic stage.

The standard adopted by the Tenth Circuit negates deterrence of drug use, overall drug abuse, and physical and safety factors as legitimate concerns important enough to justify a suspicionless search by school officials. It requires Tecumseh and other public schools within the boundaries of the Tenth Circuit to condone drug abuse among their students of which they have knowledge through reason and common sense until a sufficient amount of students in each activity can be specifically identified as drug users by teachers and administrators. Indeed, the holding of the Tenth Circuit erroneously places "immediacy" of actual drug abuse as the sole and only factor to be considered by a school district before it can implement a suspicionless drug testing policy covering students in extracurricular activities.[31]

At the least and by its very nature, the Tenth's Circuit's "sufficiency" test forces boards of education to allow drug abuse "to gain a stronghold among its schoolchildren before it may take steps" to eliminate the problem through random

[31] Although Respondents excluded Athletics from its challenge to the Policy, the ruling of the court of appeals does not. Therefore, the inherent safety risk involved in football or wrestling is no longer a factor to be considered by a board of education in the Tenth Circuit when considering the implementation of random drug testing.

testing. *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., supra,* 242 F.3d at 1284 (Pet. App. 38a) (Ebel, J., dissenting). *Vernonia* does not require Tecumseh to demonstrate a "fixed minimum quantum of governmental concern" of drug abuse before it can implement its Policy, as the Tenth Circuit decision now requires.

In reality, the immediacy of deterring drug use in Tecumseh by drug testing should have been addressed long before the implementation of the Policy. Through reason and common sense, the existence of drug abuse in Tecumseh is uncontroverted.

Vernonia should not and cannot be read to require Tecumseh to wait even longer than it already has to ensure the health and safety of its students who engage in Competitive Activities.

CONCLUSION

Tecumseh implemented its Policy in a continuing effort to deter and eliminate drug use among its students. Due to the knowledge and awareness of overall drug use among its students by the Board of Education, its administrators, teachers, and the patrons within its community, a logical solution would have been to apply the Policy to the entire student population, an application that no doubt a majority of Tecumseh and other school officials, educators and parents would readily condone. However, Tecumseh realizes it cannot deny students their right to a free public education if they choose to engage in substance abuse. It has therefore spent precious resources to implement numerous anti-drug measures in an attempt to reach the entire student population, knowing full well that it has not been enough to eliminate the scourge of student drug abuse.

Our society and our courts consistently grant local school officials great deference to formulate rules to ensure the safety and well being of school children. The Policy is such a rule. Although the Policy does not apply to all children for

whom Tecumseh has a duty to maintain health and safety, it applies to those students who voluntarily choose to take advantage of those additional opportunities which, in turn, increase and magnify the responsibilities of Tecumseh school officials who voluntarily choose to afford their students those opportunities.

The Policy is designed to deter students from using drugs and to help those students who engage in drugs get treatment. The Policy is not criminal in nature. It is not punitive. It does not even rise to a disciplinary measure for those students who agree to seek help after a first-time positive result. It does, however, provide the parents of the other students who wish to compete with the comfort of knowing that after regular school hours, and while in the custody of school officials, their children are protected to the extent possible from students who choose to continue to engage in drug abuse.

Tecumseh's Policy covering students in interscholastic competition is a rational and reasonable extension of the Board of Education's efforts to help its students stay away from and treat drug abuse among that part of the student population for which it has a heightened responsibility for care and safety.

Respectfully submitted,

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BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY, *et al.*,

Petitioners,

—v.—

LINDSAY EARLS and LACEY EARLS, minors, by their next friends and parents, John David and Lori Earls, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS

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56 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 9

ARGUMENT 12

I. SEARCHES IN THE SCHOOL CONTEXT, INCLUDING URINALYSIS DRUG TESTING, MUST PRESUMPTIVELY BE BASED UPON INDIVIDUALIZED REASONABLE SUSPICION OF WRONGDOING 12

II. THE DISTRICT'S DRUG TESTING POLICY, WHICH IMPOSES AN INTRUSIVE SEARCH AND SEIZURE OF URINE UPON NON-ATHLETES WITH NO HISTORY OF DRUG USE WHO ENGAGE IN NO DANGEROUS ACTIVITIES, DOES NOT MEET THE *VERNONIA* SPECIAL NEEDS EXCEPTION TO THE FOURTH AMENDMENT'S STANDARD OF INDIVIDUALIZED REASONABLE SUSPICION 17

A. The Nature Of The Privacy Interest Of Non-Athletes Here Is Considerably Stronger Than The Privacy Interests Of Athletes In *Vernonia* 18

B. The Nature Of The Privacy Intrusion Is Significant 22

Page

C. Tecumseh Has Not Demonstrated Safety Concerns Amounting To A Real And Immediate Interest Sufficient To Override Students' Fourth Amendment Rights 25

D. Tecumseh Has Not Demonstrated A Level Of Drug Use Amounting To A Real And Immediate Interest Sufficient To Override Students' Fourth Amendment Rights 32

E. The School's Drug Testing Policy Is Not Effective In Addressing A Proven Problem 43

III. THE SCHOOL'S CALL FOR CLEAR GUIDANCE IN DESIGNING DRUG TESTING REGIMES DOES NOT JUSTIFY ABANDONING THE FOURTH AMENDMENT PROTECTION AGAINST GENERAL SEARCHES 47

CONCLUSION 49

TABLE OF AUTHORITIES

Page

Cases

Adams v. Williams,
407 U.S. 143 (1972) 14

Brown v. Bd. of Educ.,
347 U.S. 483 (1954) 16, 23

Chandler v. Miller,
520 U.S. 305 (1997) ..... *passim*

City of Indianapolis v. Edmond,
531 U.S. 32 (2000) 17, 43, 48

Ferguson v. City of Charleston,
532 U.S. 67 (2001) 26, 48, 49

Griffin v. Wisconsin,
483 U.S. 868 (1987) 14

Illinois v. Gates,
462 U.S. 213 (1983) 47

Joy v. Penn-Harris-Madison Sch. Corp.,
212 F.3d 1052 (7th Cir. 2000) 28

Lee v. Weisman,
505 U.S. 577 (1992) 21

Maryland v. Buie,
494 U.S. 325 (1990) 14

Michigan v. Long,
463 U.S. 1032 (1983) 14

Miller v. Wilkes,
172 F.3d 574 (8th Cir. 1999),
vacated, 1999 U.S. App. Lexis 13289
(June 15, 1999) 28

Page

Nat'l Treasury Employees Union v. Von Raab,
489 U.S. 656 (1989) ..... *passim*

Nat'l Treasury Employees Union v. Hallett,
756 F.Supp. 947 (E.D. La. 1991) 27-28

New Jersey v. T.L.O.,
469 U.S. 325 (1985) ..... *passim*

Ornelas v. United States,
517 U.S. 690 (1996) 47

O'Connor v. Ortega,
480 U.S. 709 (1987) 14

Skinner v. Railway Labor Executives' Ass'n,
489 U.S. 602 (1989) ..... *passim*

Terry v. Ohio,
392 U.S. 1 (1967) 14

Tinker v. Des Moines Indep.
Com'ty Sch. Dist.,
393 U.S. 503 (1969) 17

Todd v. Rush County Schools,
139 F.3d 571 (7th Cir. 1998) 28

United States v. Arvizu,
534 U.S. __, 122 S.Ct. 744 (2002) 47

United States v. Brignoni-Ponce,
422 U.S. 880 (1975) 14

United States v. Knights,
__ U.S. __, 122 S.Ct. 587 (2001) 12, 14

United States v. Martinez-Fuerte,
428 U.S. 543 (1976) 13

	Page
United Teachers v. Orleans Parish Sch. Board, 142 F.3d 853 (5th Cir. 1998)	28
Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995)	*passim*
West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624 (1943)	16
Wyoming v. Houghton, 526 U.S. 295 (1999)	12
Other Authorities	
Todd Purdum, "Caution: Presidents at Play," N.Y. Times, Feb. 16, 1995	31
U.S. Department of Education, National Center for Education Statistics, Digest of Education Statistics 2000, *available at* http://nces.ed.gov /pubs2001/digest/dt039.html	9-10
"Dartmouth First Year Admissions," http://www.dartmouth.edu/~admissns/ admissions/index.html	6
"Recent Cases," 112 Harv.L.Rev. 713 (1999)	43

STATEMENT OF THE CASE

1. Before it began drug testing the "vast majority" of its students, Pet. App. 51a, Tecumseh High School boasted year after year of its tremendous success in controlling drug use. The petitioner District submitted annual federal funding applications, under a legal obligation to provide accurate information, in which it reported continuously low and decreasing drug use throughout the decade preceding its drug testing scheme. From 1989 to 1997, the District described the School as one with "very few" drug incidents, where "drug use [was] going down" and where drugs "have not identified themselves as major problems." J.A. 168, 171, 186.

Those "very few" drug incidents identified by the District rarely, if ever, occurred among the members of the Choir, Band, Academic Team or the School's other non-athletic activities. Tecumseh's teachers and School Board President all agree that the students participating in non-athletic extracurricular activities are distinctly less likely to use drugs than the student body as a whole. J.A. 100-01, 116, 119, 127. The results of the drug testing program underscore the virtual non-existence of drug use among non-athlete extracurricular students. Of the 505 high school students tested under the policy, only three tested positive, J.A. 42, 54, 107 -- and all of these students were athletes.[1]

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[1] The Solicitor General offers a misleading observation that several students who "were involved in non-athletic activities" have tested positive. Brief of U.S. at 6 n.3. In fact, the record only includes positive test results for two FFA (Future Farmers of America) members *who were also enrolled in athletic activities* and would have been tested (and caught) under an athletes-only policy of the sort considered in *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995). As noted by the court of appeals, "in the 1998-99 year . . . two students, both also athletes, tested positive. And [in] the 1999-2000 year, only one student, apparently an athlete and (continued...)

Nor did the School ever develop a concern that its non-athletes faced any special risk of physical injury. In contrast to participants in dangerous sports like football, no student has ever been injured while engaged in activities of the Academic Team, Band, Choir, or Future Homemakers of America, J.A. 50, and the few alleged dangers conjured up by the District – including such supposed hazards as Choir members tumbling off the stage, J.A. 78-79, or Band members colliding while they march in formation, J.A. 77 – are contrived and speculative.[2] Indeed, the School Board discus-

[1] (...continued)
not involved in any of the listed extracurricular activities, tested positive." Pet. App. 16a; *see also* J.A. 107; C.A. App. 570-74.

[2] The Solicitor General hypothesizes dangers of "working with cutlery or sharp instruments" in Future Homemakers of America competitions. Brief of U.S. at 18. This claim misrepresents the record. While Future Homemakers of America *classes* may use knives, C.A. App. 671, 678, these students are not subject to drug testing. The Future Homemakers of America extracurricular activities consist of such benign undertakings as "compet[ing] in a job interview competition, creed interpretation when they would memorize the FHA creed and [being] judged according to how expressively they say it," as well as "[i]llustrated talks when they would research and relate a topic" and "parliamentary procedure team." C.A. App. 672.

The Solicitor General also misses the mark in claiming the drug testing of non-athletes is justified because of "building a 15-foot-high human pyramid (as cheerleaders do)." Brief of U.S. at 18. The School considers cheerleading to be an athletic activity as evidenced by its requirement that cheerleaders and "pom pom" meet the full eligibility requirements of the Oklahoma Secondary School Activities Association (OSSAA), whereas Band, Choir and the other activities must meet only the non-athlete requirements of OSSAA. J.A. 45; *see also* C.A. App. 785 (initial "Student Athlete Drug Testing Policy" definition of "student athlete . . . includes athletes and cheerleaders"). Respondents have never sought to participate in cheerleading or any other athletic activity and have not challenged the application of the drug testing policy to these activities. J.A. 27.

sions of the drug testing policy included no consideration at all of safety concerns. J.A. 155.

In early 1998, the School Board President encountered several parents who insisted that the School should do more to combat drug use. One parent in particular captivated the Board's attention with her passionate account of marijuana use by her son and by several of his teammates on the high school football team. J.A. 86-87; C.A. App. 565. As the Board began to consider drug testing as a response to these several vocal parents, the Board initially focused on the problem among athletes that the parents had identified. Pet. App. 52a n.2; J.A. 138. A sense of even-handedness, however, moved the Board President to suggest that the policy should be extended to others, not because of a drug problem or any special risks among these non-athletes, but because it seemed somehow unfair to single out the athletes. J.A. 89. In one fateful meeting, the Board President and others "all started naming off different organizations because each one of us has a different organization that's our pet." J.A. 89. They eventually settled upon inclusion of all students who "represent" the school before the public, reflecting a determination to signal to parents and the general public a "tough on drugs" attitude. J.A. 91.

Lacking any evidence of drug use among students involved in non-athletic extracurricular activities or any articulated safety concerns, the Board of Education nevertheless adopted the Student Activities Drug Testing Policy. *See* J.A. 193-205. Under the Policy, students participating in competitive extracurricular activities must submit to mandatory, suspicionless urinalysis tests and must also submit a list of current medical prescriptions. Pet. App. 4a-5a.[3]

[3] The Solicitor General again reveals a lack of familiarity with the record in suggesting that prescription drug information is provided only in (continued...)

Those who do not are barred from the covered activities including Academic Team, Band, Choir, Show Choir, Color Guard, FFA, and Future Homemakers of America. Pet. App. 5a. Because extracurricular activities play such an important role in the life of Tecumseh students, the "vast majority" of the School's students participate in these activities and are subject to the drug test. Pet. App. 51a.

2. Lindsay Earls, now in her freshman year at Dartmouth, was a high school sophomore when her school implemented its new drug testing policy.[4] She excelled at extracurricular activities, building her talents, confidence and social skills. Rather than frequenting parties or focusing on dating, C.A. App. 182-84, she devoted herself to the school's Academic Team, Choir, Show Choir, and Marching Band. In order to pursue college music scholarships, J.A. 16, she depended upon being able to participate in the Choir and Band performances attended by college music directors. J.A. 134-35. Indeed, to meet her highest aspiration of attending a competitive college, she knew she would have to excel at a range of extracurricular activities. J.A. 16. With a schedule filled with school and activities, she was so removed from drug use that she had utterly no idea what drugs look like or who might use them. J.A. 108; C.A. App. 181.

Lindsay Earls values her modesty and propriety. The School's new policy put her in a difficult position, forcing her to relinquish her genuinely held privacy in order to remain in the extracurricular activities that were so central to her high school experience and so critical to her chances of a scholarship or admission to a competitive college like Dartmouth. *See* J.A. 97-98, 133-35; C.A. App. 448, 455, 780.

Her first experience in having the school collect her urine proved memorable. In early 1999, a principal's assistant came to Lindsay's class, and, in front of her teacher and classmates, ordered Lindsay to report to the school gymnasium for her drug test. J.A. 16-17. Because the school employs its own teachers to collect urine samples, Lindsay found herself urinating into a plastic vial while three faculty members listened from outside the stall for the "normal sounds of urination." J.A. 150. One of the faculty monitors joked that the process seemed like an exercise in "potty training." J.A. 17. Lindsay, in turn, felt embarrassed. J.A. 17. When she emerged from the stall, Lindsay was required to watch as one of her teachers took the vial in hand, feeling Lindsay's urine sample to ensure that it was the proper temperature and holding Lindsay's urine up in the light to inspect its color and clarity. J.A. 150-51. This collection and close examination of bodily fluid by a teacher whom Lindsay would regularly see at school is hardly equivalent, as the School maintains, to the normal process of using a public restroom. Further, the testing process itself imposes upon students a presumption of guilt, leaving the student to prove

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[3] (...continued)
sealed envelopes as part of the testing process. Brief of U.S. at 16-17. In addition to disclosing medications in the more controlled context of administering the drug test, all students filled out a list of prescription drugs at the beginning of the school year as part of the consent form for drug testing handed to teachers. *See* J.A. 205. Teachers necessarily viewed prescription drug information, since they were expected to sign the forms, J.A. 204, after reviewing them for completeness. J.A. 129. The record further shows that this prescription drug information was not treated confidentially. *See infra* at 24-25.

[4] Respondent Lacey Earls, the younger sister of Lindsay Earls, was added as a plaintiff after entry of judgment in the district court. Pet. App. 80a. She remains a student at Tecumseh High School. After filing this suit, respondent Daniel James was forced to transfer from the School District when his application to continue at Tecumseh High School as a non-resident was denied. He is now enlisted in the United States Air Force.

his or her innocence by producing a "clean" urine specimen. While Lindsay's drug test confirmed that she had not used drugs, J.A. 35, any student taking the test had to face the fear and uncertainty that an erroneous test result could impose an unfair stigma. J.A. 18.

Lindsay would later learn that her school had failed to ensure the protection of private information about prescription drug use submitted under the drug testing policy. For example, the Choir teacher looked at students' prescription drug lists and left them where other students could see them. J.A. 129-32. The results of a positive drug test, too, were disseminated to as many as thirteen faculty members at a time, J.A. 105-06, and these test results generally became known to other students when a student suddenly was suspended from his or her activities shortly after administration of a drug test.

The School left Lindsay only one option if she wished to safeguard her privacy concerns: exclusion from extracurricular activities. For Lindsay, like many American school children, extracurricular activities have become an integral part of the educational experience. Banishment from the Choir, Show Choir, Band and Academic Team would have imposed a stigma that would have been devastating. In order to preserve a very normal notion of privacy, Lindsay would have had to cut herself off from much of her school's life. Beyond the isolation, Lindsay's exclusion from her extracurricular activities would have imposed a serious hurdle in gaining admission to a competitive college like Dartmouth. Pet. App. 21a; *see also* "Dartmouth First Year Admissions," *available at* http://www.dartmouth.edu/~admissns/admissions/index.html. Good grades alone simply do not suffice. Finally, Lindsay faced the loss of the opportunity to earn graded class credits, which may be used to raise grades in classes associated with extracurricular activities. Pet. App. 71a.

exclusion

may

extracurricular

(Cup)

The extracurricular activities found so vital by Lindsay Earls also serve as the most effective means of preventing students from using drugs, committing crime, becoming pregnant, or dropping out of school. *See* Brief of *Amici Curiae* American Academy of Pediatrics (AAP), *et al.* In recognition of this stark reality, the AAP has opposed policies like Tecumseh's for several years: rather than depriving children of the very lifelines which keep them out of trouble and away from drugs, the AAP recommends medical evaluation based on individualized indications of drug abuse. *Id.*; *see also* C.A. App. 519 (Board President agrees that activities like Choir are "an important way to keep [students] off drugs" because "if they are kept busy with activities from school they don't have as much time on their hands to go and mingle and drive up and down the street, things like this"). The illusory benefits of suspicionless drug testing could well explain the fact that only a "handful" of the 15,000 school districts across the nation "have taken up drug testing," according to an attorney for the National School Boards Association. C.A. App. 856. & the

(Cup)

Lindsay Earls, along with the other respondents, filed suit in August 1999, challenging the constitutionality of the School's mandatory, suspicionless drug testing of students targeted solely because they participate in non-athletic activities such as the Choir, Band, and Academic Team. J.A.7-29. Respondents did not challenge the Policy insofar as it applies to athletes, or insofar as it provides for drug testing upon reasonable, individualized suspicion. J.A. 28. The students sought injunctive and declaratory relief only. *Id.*

3. The district court, ruling on cross motions for summary judgment, entered judgment in favor of the School. The district court looked to *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995), in which the Court upheld a drug testing policy of athletes who acted as the "leaders" of the "drug culture" in a "drug-infested school," who faced the

risk of serious injury during their athletic activities, and who had lowered privacy expectations because of physical exams and a practice of communal undressing and showering. 515 U.S. at 649. Despite finding that drug use at Tecumseh schools was not a major problem, Pet. App. 57a, and despite noting many of the remarkable differences between the student athletes involved in *Vernonia* and the students in this case, Pet. App. 65a, 76a-77a, the district court relied heavily on its concern about the prevalence of drugs in society as a whole and in schools across the nation in finding the drug test at Tecumseh's schools constitutional. Pet. App. 61a-62a.

4. The court of appeals reversed, Pet. App. 27a, finding the search unreasonable in light of the legal principles announced by the Court in the primary cases concerning the Fourth Amendment in the school context: *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), and *Vernonia*. The court recognized the familiar rule that the school context gives rise to a special need to dispense with the warrant and probable cause requirements of the Fourth Amendment, while generally retaining the need for individualized reasonable suspicion before a search. *See T.L.O.*, 469 U.S. at 340. The court then found the record in this case did not meet the *Vernonia* standard for eliminating individualized suspicion altogether.

In establishing the nature of the governmental concerns giving rise to the test, the court of appeals fully recognized the importance of deterring drug use among students in America's schools. Pet. App. 22a. However, the court also noted that the extracurricular activities at issue in this case did not involve the sort of safety concerns that the Court highlighted in upholding the drug testing of student athletes in *Vernonia*. Pet. App. 23a. The court further held that where, as here, the evidence clearly indicates that drug use among the group targeted for drug testing is "negligible,"

Pet. App. 19a, the immediacy of the governmental concern is significantly diminished. Pet. App. 24a. On this point, even the dissenting judge acknowledged "[t]he immediacy of the school district's concern is, as noted by the majority, the weakest part of the school district's case." Pet. App. 38a. In recognition of the decreased governmental concern, the absence of safety risks involved, and the lack of efficacy of testing a group unlikely to use drugs, the court of appeals found this testing scheme unconstitutional under the Fourth Amendment. Pet. App. 24a-25a.

SUMMARY OF ARGUMENT

Tecumseh High School's decision to subject the vast majority of its student body to suspicionless drug testing goes far beyond anything authorized by the Court in *Vernonia* and cannot be reconciled with the Fourth Amendment principles that the Court has consistently applied, even in the school context.

Given the careful line drawn by the Court in *Vernonia*, the School is simply wrong to assume that a broader license was implied. This is not a case about student athletes. It is a case about students who engage in extracurricular activities that do not present any special risk of physical injury in a school district that has consistently denied any significant drug problem. In order to defend the challenged drug testing policy, both the School and the Solicitor General argue, in essence, that the mere fact of running a public school justifies suspension of the Fourth Amendment right to individualized suspicion before a search, at least when the specter of drugs is invoked. That result would leave no principled limitation to prevent drug testing all 23.7 million students[5]

[5] *See* U.S. Department of Education, National Center for Education Sta- (continued...)

in junior and senior high schools throughout the nation -- approximately ten percent of all United States residents. Never has any court ruling endorsed a suspicionless search of such a significant segment of the population.

Two fundamental principles of the Court's Fourth Amendment jurisprudence control any evaluation of whether a search of students is reasonable under the Fourth Amendment. First, in striking the balance between a student's privacy and a school's disciplinary needs, a school may generally forego the requirements of a warrant or probable cause only if the school has a reasonable suspicion that the *individual* student being searched has committed some wrong. *T.L.O.*, 469 U.S. at 333 n.2. Blanket searches are presumptively invalid. Second, as the only exception ever allowed to the *T.L.O.* rule -- *i.e.*, the sole instance of permitting suspicionless searches in a school -- the Court in *Vernonia* upheld a generalized search of students only upon showing a number of demonstrated and specific circumstances establishing a governmental interest reaching beyond the school's everyday needs.

In *Vernonia* the school targeted athletes because they were the epicenter of the problem in a school with mounting disciplinary problems, the "leaders" of a "rebellion" with proven drug histories engaged in hazardous activities who acted as role models for other students. Moreover, these same athletes had the lowest privacy expectations of any group of students, given their submission to intrusive physical examinations and their communal showering and disrobing in the locker room. Here, in contrast, non-athletes have

[3] (...continued)
tistics, Digest of Education Statistics 2000, Chapter 2: Elementary and Secondary Education, Table 39, *available at* http://nces.ed.gov/pubs2001/digest/dt039.html (providing 1998 grade-by-grade statistics showing a total of 23,697,353 public school students in grades six through twelve).

no history of drug use or discipline problems, engage in no dangerous activities, and there is no indication that their social behavior is mimicked by other students. In fact, the Tecumseh School Board, by targeting activities like the Band, Choir, and the Future Homemakers of America, have picked the students least likely to use drugs, least likely to incur or cause injuries, and least likely to provoke drug use among other students. Finally, the non-athletes who bring this case have never submitted to any privacy intrusions of the sort facing the *Vernonia* athletes. In short, every single factor (aside from the mere fact of being students) that justified drug testing in *Vernonia* is absent here. By disregarding these factors that were so critical in *Vernonia*, the challenged Policy effectively converted a rare Fourth Amendment exception into a routine and indefensible norm.

Tecumseh's hasty decision to drug test its non-athletes resembles the "symbolic" attempt to drug test candidates struck down in *Chandler v. Miller*, 520 U.S. 305 (1997). There, the Court stressed the absence of any evidence of drug use among the targeted group, as well as the state's failure to demonstrate that the group engaged in any activity involving concrete, immediate harm. *See id.* at 318-19. Like the Georgia legislature in *Chandler*, the Tecumseh School Board here is an elected body, responsive to a political imperative to appear tough on drugs, but ultimately lacking a demonstrated governmental interest to justify a programmatic search of innocent individuals.

The Fourth Amendment was born of colonial fury at British writs of assistance – general orders for the king's deputies to enter any place at any time in search of contraband. *See Vernonia*, 515 U.S. at 669 (O'Connor, J., dissenting). At the founding the targeted evil was alcohol, rather than narcotics, but little else differs. Colonists raised an outcry against allowing tax collectors to interrogate citizens regarding annual alcohol consumption. The modern

practice of drug testing without individualized suspicion constitutes a more sophisticated but no less intrusive search. *T.L.O.*, *Vernonia*, and *Chandler* make clear that the suspicionless search remains an anathema unless the government makes out a strong, particularized case of need -- a circumstance plainly not present for a generalized search of all non-athlete extracurricular students lacking any history of drug use and despite the fact that they engage in no activities that make drug use peculiarly dangerous.

ARGUMENT

I. SEARCHES IN THE SCHOOL CONTEXT, INCLUDING URINALYSIS DRUG TESTING, MUST PRESUMPTIVELY BE BASED UPON INDIVIDUALIZED REASONABLE SUSPICION OF WRONGDOING

State-compelled urinalysis is a "search" subject to the demands of the Fourth Amendment. *See, e.g., Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). "The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *United States v. Knights*, __ U.S. __, 122 S.Ct. 587, 591 (2001)(quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

The Court's two cases concerning searches in the school context -- *T.L.O.* and *Vernonia* -- stand as two ends of a spectrum. At one end is *T.L.O.*, which defines the general rule. Under *T.L.O.*, a school need not obtain a warrant or establish probable cause to search, but any search must be based on "reasonable grounds for suspecting that the search

will turn up evidence that the student has violated or is violating either the law or the rules of the school." 469 U.S. at 340-41. *T.L.O.* thus reaffirms that, even in the school context, individualized suspicion is the central defining element of a reasonable search. It is a compromise that has effectively preserved the disciplinary authority of school officials, while striving to protect student privacy from overzealous intrusions.

At the other end of the spectrum is *Vernonia*, which permitted a school with particularly urgent needs to randomly drug test student athletes, a group described by the Court as having particularly diminished privacy expectations. In the Court's view, this combination justified a departure from the *T.L.O.* rule, but nowhere did the Court suggest that *Vernonia* overruled or undermined *T.L.O.* The starting point for evaluating the reasonableness of any school search remains individualized suspicion. Conversely, a school may conduct generalized searches only upon showing a combination of heightened need and lowered privacy of the sort found in *Vernonia*.

The Court in *T.L.O.* did not, of course, close the door entirely to more sweeping school searches -- indeed, the holding in *Vernonia* demonstrates that such searches are permitted upon a showing of a need beyond the ordinary needs of school administration. Still, *T.L.O.* noted rightly that "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[, even if] the Fourth Amendment imposes no irreducible requirement of such suspicion." *Id.* at 342 n.8 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976)); *see also Chandler*, 520 U.S. at 313 ("To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing"). This bedrock Fourth Amendment principle has been applied by the Court in numerous cases, both before and since *T.L.O.* *See, e.g.,*

Terry v. Ohio, 392 U.S. 1, 24-25 (1967)(pat-down search); *see also Maryland v. Buie*, 494 U.S. 325 (1990)(protective search of suspect's house during arrest); *Michigan v. Long*, 463 U.S. 1032 (1983)(protective search of glove compartment); *United States v. Brignoni-Ponce*, 422 U.S. 880 (1975)(border patrol search of vehicles); *Adams v. Williams*, 407 U.S. 143 (1972)(protective weapons search of suspect's person).

Contrary to petitioners' approach, this Court has always been sensitive to the critical constitutional divide separating searches based on some individualized suspicion and searches entirely lacking in any individualized suspicion. For example, in *O'Connor v. Ortega*, 480 U.S. 709, 728 (1987), this Court invoked *T.L.O.* to uphold the warrantless search of a government employee's office based on reasonable individualized suspicion. But the Court has not read that decision as opening the door to suspicionless drug testing of government employees, which is permitted only under narrow circumstances involving diminished privacy expectations and a serious risk to public safety. *See Von Raab*, 489 U.S. at 668-71; *see also Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)(probationers present special need); *Knights*, 122 S.Ct. at 591 (continuing to look to a finding of individualized suspicion as the primary, most reliable indicium of reasonableness).

On this spectrum between *T.L.O.* and *Vernonia*, this case falls decidedly on the *T.L.O.* end of the scale. The programmatic purpose of the drug testing here is closely akin to the everyday needs of a school -- encouraging a group of well behaved students to continue to behave. By contrast, in *Vernonia* the Court found a congruence of at least six circumstances, which in combination justified suspension of the need for individualized reasonable suspicion: (1) student athletes were "the leaders of the drug culture," 515 U.S. at 649; (2) these athletes were imitated as role

models by other students, *see id.* at 663; (3) the rampant and unchecked substance abuse by these athletes fueled an "immediate crisis" in a "drug-infested school," *id.* at 649, 662-63; (4) disciplinary problems had reached "epidemic proportions," *id.*; (5) drug use by these athletes could and did cause severe injury on the playing field, *see id.* at 663; and (6) these athletes have even less of a legitimate privacy expectation than other students, because of communal undressing and showering required for athletic participation and because athletes are subject to preseason physical exams, *see id.* at 657. In view of these circumstances, the majority concluded that the school district's policy was constitutional, but cautioned "against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts." *Id.* at 665.

In Tecumseh High School, the members of the Choir, Band and other such activities share *none* of the six characteristics that justified suspicionless drug testing of athletes in *Vernonia*. They exhibit no history of drug use; they are not role models for other students' social behavior; the school itself has demonstrated only a minimal level of drug use and, indeed, describes its discipline problems as minimal and well controlled by pre-existing measures; no risk or history of drug related injuries exists; and the members of the Choir, Band and other such activities do not receive physical exams or engage in communal undressing or showering of the sort practiced among *Vernonia*'s athletes. As we demonstrate in detail below, the elements of governmental need and lack of privacy found in *Vernonia* are *all* absent here. There is thus no justification for abandoning the requirement of individualized suspicion set forth in *T.L.O.* It provides the school ample leeway to discipline and control its students, while ensuring that students like Lindsay Earls do not face unreasonable and intrusive searches merely for joining the extracurricular activities that most schools and parents embrace and encourage.

As part of a school's responsibility to its students and their parents, it must act "within the limits of the Bill of Rights." *T.L.O.*, 469 U.S. at 334 (quoting *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943)). If students learn that authorities may casually disregard the "scrupulous protection of Constitutional freedoms of the individual," this will "strangle the free mind at its source" and "teach youth to discount important principles of our government as mere platitudes." *T.L.O.*, 469 U.S. at 334 (quoting *Barnette*, 319 U.S. at 637). Schools are where the civic democratic spirit is renewed; schools are not institutions of coercion and captivity. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)(education should instill in students "the very foundation of good citizenship"). Indeed, while the Court has taken "notice of the difficulty of maintaining discipline in the public schools today," it has also held that "the situation is not so dire that students in the schools may claim no legitimate expectations of privacy . . . . We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment." *T.L.O.*, 469 U.S. at 338-39.

The kind of unsubstantiated anecdotal evidence of drug use that the District puts forth in support of a special need for drug testing could be conjured from the halls of every high school in America. If every student in every school is subject to testing, the need devolves from being special to merely routine – a lesson to all students that the Constitution is a mere platitude, that no rights are inalienable, and that liberty is available only at the whim of state authorities. As the Court has explained, "the care this Court took to explain why the needs in *Skinner*, *Von Raab*, and *Vernonia* ranked as 'special'" would be "wasted" if such broad justifications could be invoked to justify exceptions to the Fourth Amendment's normal preference for individualized suspicion. *Chandler*, 520 U.S. at 322.

II. THE DISTRICT'S DRUG TESTING POLICY, WHICH IMPOSES AN INTRUSIVE SEARCH AND SEIZURE OF URINE UPON NON-ATHLETES WITH NO HISTORY OF DRUG USE WHO ENGAGE IN NO DANGEROUS ACTIVITIES, DOES NOT MEET THE *VERNONIA* SPECIAL NEEDS EXCEPTION TO THE FOURTH AMENDMENT'S STANDARD OF INDIVIDUALIZED REASONABLE SUSPICION

In *Tinker v. Des Moines Indep. Com'ty Sch. Dist.*, 393 U.S. 503, 506 (1969), the Court stressed that students do not "shed their constitutional rights . . . at the schoolhouse gate." Among the most basic of students' rights is the Fourth Amendment, which "generally bars officials from undertaking a search or seizure absent individualized suspicion." *Chandler*, 520 U.S. at 308. This crucial requirement of individualized suspicion may be waived only in "closely guarded," *id.* at 309, and "limited" circumstances "where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion." *Id.* at 314 (internal quotation marks omitted).

On occasion, the Court has allowed "certain regimes of suspicionless searches where the program was designed to serve special needs, beyond the normal need for law enforcement." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000)(internal quotation marks omitted). But, in order to override the Fourth Amendment's normal requirements, the government need must rise beyond a generalized desire to deter misconduct, including drug use. *See Chandler*, 520 U.S. at 318. To survive constitutional scrutiny, therefore, the School's Policy must be designed to serve a special need, beyond the normal need for school discipline that prompted the Court in *T.L.O.* to find the warrant and proba-

ble cause requirements inapplicable in schools. It plainly is not.

In *Vernonia*, the Court identified four factors to be balanced in evaluating the constitutionality of the challenged school drug testing policy: (1) the nature of the privacy interest upon which the search intrudes; (2) the nature and character of the intrusion; (3) the nature and immediacy of the governmental interest at issue; and (4) the efficacy of the drug testing scheme as a means for addressing the drug problem. *Vernonia*, 515 U.S. at 654, 658, 660. Petitioners fail to carry their burden of making a showing under these *Vernonia* factors that the District's suspicionless drug testing of non-athletes promotes an important and immediate governmental interest sufficient to outweigh the privacy intrusion at issue here.

A. The Nature Of The Privacy Interest Of Non-Athletes Here Is Considerably Stronger Than The Privacy Interests Of Athletes In *Vernonia*

Respondents do not take issue with the unexceptional proposition, relied on so heavily by petitioners, that "students within the school environment have a lesser expectation of privacy than members of the population generally." *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring). Neither does this truism justify the suspicionless drug testing of all students. What is required under this prong of the *Vernonia* test, and what the record here does not support, is the proposition that Tecumseh's non-athlete students have taken actions to reduce their privacy expectations beyond those of most other students. To the contrary, the privacy expectations of non-athletes here are manifestly greater than those of the student athletes in *Vernonia*.

1. Student athletes accede to a number of significant privacy intrusions not imposed on other students. The district court correctly recognized that the analysis in *Vernonia* relied upon the fact that "athletes have even less of a legitimate privacy expectation [than other students], because an element of communal undressing is inherent in athletic participation, and because athletes are subject to preseason physical exams and rules regulating their conduct." Pet. App. 63a (citation omitted). In sharp contrast, none of the non-athletic activities covered by Tecumseh's scheme require communal showering or disrobing in front of other students. *Id.* at 65a; J.A. 63-64, 145-46. Similarly, the Policy, by its terms, exempts non-athletes from submitting to the annual physical examination required for athletic activities. J.A. 196; *see* Pet. App. 65a; J.A. 63-64, 144-45.

As the district court found, the only manner in which plaintiffs' privacy expectations may differ from those of the general student body involves imposition of "extra" regulations, as discussed in *Vernonia*, 515 U.S. at 657. Pet. App. 66a. However, Tecumseh's non-athletes are largely exempt from the distinctive "extra" regulations listed in *Vernonia*: (1) submitting to preseason physicals; (2) acquiring insurance coverage; (3) maintaining a minimum grade point average; and (4) complying with "any rule of conduct, dress, training hours and related matters as may be established for each sport by the head coach[.]" *Id.* Here, non-athletes take no physicals, acquire no insurance coverage, J.A. 64, and are not subject to coaches' control over their conduct, dress, or schedule. The only extra "regulation" is the need to maintain passing grades in order to participate in competitions - a measure that is not even an "extra" rule, since it applies to all students who go on field trips or leave the campus for any reason, J.A. 104, and it certainly does not intrude on students' privacy. In sum, the grand total of measures that supposedly set respondents apart as having lower privacy expectations amounts to nothing more than a widely applied expectation that students pass their classes.

2. The District does not dispute that athletes alone are required to communally shower, undress, and undergo physical examinations. Instead, the District points to use of "public-like" restrooms occasionally used during overnight travel and "modest students [who have] ingeniously discovered how to disrobe in and out of their Choir uniforms on a school bus full of other students." Pet. Br. at 34. The contrast to the athletes in *Vernonia* and athletes at Tecumseh High School remains striking. These "public-like" restrooms allow for students' privacy while showering, in contrast to communal showers used by athletes. The modest Choir students are able to change in and out of Choir uniforms on a school bus without actually being nude like the athletes disrobing completely in a locker room. C.A. App. 295-96. Nothing in the actions of the non-athletes compares to the physical examinations undergone by athletes including, for male athletes, a hernia examination in which their genitals are directly manipulated. J.A. 149. Petitioners conclude that the non-athletic activities are "not for the bashful," Pet. Br. at 34 (quoting *Vernonia*, 515 U.S. at 657), but they can point to nothing as a basis for their conclusion.

The claim that students face onerous privacy intrusions from "the rules and regulations of the OSSAA," which can "deem a student ineligible 'whose conduct or character outside the school is such to reflect discredit upon the school'" (Pet. Br. at 35-36 (citing J.A. 194)), is vastly overstated. As the District has admitted, this vague "rule" of generalized good conduct has never once been applied to any student at any Oklahoma school. J.A. 46. Petitioners would have the Court find that this vague, never applied regulation is akin to participating in a closely regulated industry. Pet. Br. at 36.

3. The fact of "volunteering" for extracurricular activities does not, as petitioners claim, forfeit students' privacy expectations. The Tenth Circuit correctly concluded: "We

do not believe that voluntary participation in an activity, without more, should reduce a student's expectation of privacy in his or her body. Members of our society voluntarily engage in a variety of activities every day, and do not thereby suffer a reduction in their constitutional rights." Pet. App. 20a. For instance, a range of clubs and non-competitive activities, many of which involve off-campus travel and meetings after school, are, as the District admits, "privileges and are voluntary." J.A. 61-62.

The notion that the special needs exception to the Fourth Amendment can rest on choosing an activity, rather than upon a governmental need, finds no support in the case law. For instance, the electoral candidates in *Chandler* chose to run for office, yet the lack of a governmental special need was constitutionally fatal to the State's drug testing program. The plaintiffs in *Skinner* and *Von Raab*, too, chose to hold particular employment, but this factor played no role in the Court's consideration of those cases.

Here, the "choice" to participate in extracurricular activities is of grave consequence to Tecumseh's students. *See Lee v. Weisman*, 505 U.S. 577, 595 (1992)(striking down school prayer at high school graduation where, although student could choose not to attend graduation, decision is not voluntary in meaningful sense because of "forfeiture of . . . intangible benefits"). Extracurricular activities help students stay in school and teach important personal and vocational lessons. In addition, cutting off the opportunity for extracurricular competition harms students by lowering their chances of gaining admission and winning scholarships to universities. J.A. 97-98, 133-35; C.A. App. 780; *see also* Brief *Amici Curiae* of American Academy of Pediatrics, *et al.* For the School to label such activities "voluntary" ignores the penalty suffered by those unable to participate. If forfeiting one's constitutional rights becomes the price for participating in any activity beyond legally compelled class-

room attendance, then only the most withdrawn and uninvolved students will enjoy the protection of the Bill of Rights.

B. The Nature Of The Privacy Intrusion Is Significant

1. The brief history of drug testing litigation reveals a marked judicial ambivalence about the extent to which providing a urine sample intrudes upon reasonable expectations of privacy. Petitioners offer a mechanical application of *Vernonia*: if the urine collection and confidentiality policy there passed muster, then the School here has acted appropriately (regardless of the other *Vernonia* factors). Yet, Justice Scalia, author of the *Vernonia* decision, has deemed state-compelled urinalysis "particularly destructive of privacy and offensive to personal dignity," a "demeaning bodily search," and a "needless indignity." *Von Raab*, 489 U.S. at 680, 684, 685 (Scalia, J., dissenting). Similarly, the Court in *Skinner* stated that "[t]here are few activities in our society more personal and private than the passing of urine." 489 U.S. at 617 (internal quotation marks omitted).

Certainly, where approximately ten percent of Choir students have come forward to the Choir teacher with concerns about the drug test, Pet. App. 68a n.38, where one or more students may have dropped Choir entirely because of their embarrassment over the test, *id.*, and where students "giggled and snickered" during testing, *id.*, it can safely be inferred that the District's scheme is an invasion of privacy well beyond routine restroom use.

The judicial ambivalence and students' reaction are consistent with the way society itself deals with the passing of urine. The necessity of using public restrooms is reconciled with subjectively powerful feelings that urination is a private matter by construction of familiar social conventions -- we

do not generally converse or even make eye contact while using a public restroom. Once outside, conversation resumes but, while in the restroom, people generally create a sense of privacy by not engaging with others and expecting that others will not engage with them.

When Lindsay Earls provided her urine sample, the usual conventions of non-interaction were necessarily broken down. It was made explicit that a teacher whom she knew well and saw daily would be listening actively to her urination. Pet. App. 69a n.39. She knew that the teacher would closely examine her urine, viewing its color and feeling its temperature. *Id.* She knew that other students would be aware of the same. Even if no one laid eyes on her as she passed urine, the carefully constructed conventions of public restrooms were abolished.

The contrast to providing a urine sample in a medical office is telling. There, a patient knows that no one is listening outside the door. White coats, lab equipment, and the assurance that friends and teachers are not in the room with the patient all construct a familiar, comforting social convention. The nature of the medical relationship is, by design, confidential and is not part of an effort to ferret out bad conduct. The point is to help the patient, not to detect wrongdoing by the patient. *See generally* Brief of *Amicus Curiae* American Academy of Pediatrics, *et al.*

At a level of both subjective and objectively reasonable feelings, a drug testing regime conducted by a school is intrusive. It would become tolerable, if ever, only through repetition. And this, too, should concern the Court. If a urine test becomes a rite of societal passage, then adults will have ever less room to complain of its intrusiveness. As the Court pointed out in *Brown v. Bd. of Educ.*, public schools foster the ideals of democracy, but under Tecumseh's drug testing program, the school fosters the expectation that pri-

vacy is of no value. And as that expectation becomes ingrained, the Fourth Amendment and the notion of privacy itself risks becoming ever more vulnerable to an inquisitive government. *See Von Raab*, 489 U.S. at 687 (Scalia, J., dissenting)(widespread drug testing would result in "a coarsening of our national manners that ultimately give the Fourth Amendment its content").

2. Tecumseh's drug testing scheme provides no effective protection against the disclosure of confidential information. Tecumseh's policy allows notification of school personnel who have an unspecified "need to know," a variable term defined by school officials on a case-by-case basis. C.A. App. 606-07. Because in practice, the District reveals test results to all coaches and activity sponsors, and not just to athletic directors as in *Vernonia*, 515 U.S. at 651, the number of individuals notified quickly becomes excessive. *See supra* at 6 (potential disclosure to thirteen school employees). The required disclosure of students' confidential prescription medication information to school personnel would itself raise a red flag but, more disturbingly, the school has been careless in protecting that information: for example, the Choir teacher looked at students' prescription drug lists and left them where other students could see them. J.A. 129-32. The *Vernonia* Court stated that just this kind of compelled disclosure of medical information "raises some cause for concern," explaining that:

> In *Von Raab*, we flagged as one of the salutary features . . . the fact that employees were not required to disclose medical information unless they tested positive, and even then, the information was supplied to a licensed physician rather than to the Government employer.

Vernonia, 515 U.S. at 659 (citation omitted).

C. Tecumseh Has Not Demonstrated Safety Concerns Amounting To A Real And Immediate Interest Sufficient To Override Students' Fourth Amendment Rights

The School's Policy fails most decisively under the prong of the *Vernonia* test requiring that the suspension of Fourth Amendment norms comes in response to a real and immediate problem. A real and immediate interest can rest upon some combination of demonstrated drug use among the targeted group and the group members' performance of hazardous activities. We first address the lack of safety concerns underlying the drug testing of non-athletes.

1. By drug testing hundreds of students who undertake no hazardous activities whatsoever, the School ignores the well-settled conclusion that the concern for safety forms the cornerstone of special needs jurisprudence. Beginning with the companion cases, *Skinner* and *Von Raab*, the Court has emphasized that the departure from the usual requirement of individualized suspicion grew from a particularized and ultimately superseding need to protect the public from a tangible and significant threat:

> Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences. Much like persons who have routine access to dangerous nuclear power facilities, employees who are subject to testing . . . can cause great human loss before any signs of impairment become noticeable to supervisors or others.

Skinner, 489 U.S. at 628 (citation omitted). Nothing less than "surpassing safety interests" in *Skinner*, *id.* at 634, or "extraordinary safety and national security hazards" in *Von Raab*, 489 U.S. at 674, were held sufficient to override the

usual protections of the Fourth Amendment. Where, as here, the governmental need is not grounded in any appreciable history of drug use, showing a need based on safety concerns is all the more critical.

In *Vernonia*, safety was again of pivotal importance in finding a special need for a drug testing regime aimed specifically at athletes engaging in risky sport activities. The Court cautioned against petitioners' tactic here of assuming that the risk of injury from the activity giving rise to drug testing was unimportant to the *Vernonia* decision: "[I]t must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high." *Vernonia*, 515 U.S. at 662. Justice Ginsburg's concurrence again emphasized the unique safety concerns faced by student athletes. *Id.* at 666. And only this past Term, Justice Kennedy described *Vernonia* as resting, not merely upon generalized concern for student drug use, but upon the specific harms facing the students actually targeted under the *Vernonia* policy:

> [W]e sustained the [drug testing] policy as furthering . . . the policy's ultimate goal: "deterring drug use by our Nation's schoolchildren," and *particularly by student-athletes, because "the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high."*

Ferguson v. City of Charleston, 532 U.S. 67, 87 (2001) (Kennedy, J., concurring)(emphasis added)(quoting *Vernonia*, 515 U.S. at 661-62).

Nor were the safety concerns in *Vernonia* based upon mere speculation: the Court noted a severe injury and various omissions of safety procedures and miscxecutions attrib-

utable to documented drug use among athletes. *Vernonia*, 515 U.S. at 649; *see also id.* at 662 ("the particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes"). At least implicitly, the Court recognized that, just as schools can protect themselves from the risk of athletes' injury by routinely examining student athletes for heart problems, hernia or asthma, a school can screen for drug use because it, too, poses a heightened danger for students engaged in vigorous physical activity.

Consonant with this precedent, the Court's most recent drug testing case struck down a suspicionless search of candidates for state office, with the eight-Justice *Chandler* majority emphasizing:

> We reiterate, too, that where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as "reasonable" -- for example, searches now routine at airports and at entrances to courts and other official buildings. *But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.*

Chandler, 520 U.S. at 323 (emphasis added).

Every court to address drug testing has uniformly looked to safety as a crucial factor in applying the special needs test. For instance, the remand of the Court's decision in *Von Raab* called for an examination of the safety sensitivity of certain agency employee positions, 489 U.S. at 678-79, leading the lower court to allow drug testing for armed drug interdiction agents (as instructed by this Court), while barring drug tests of animal handlers, clerks and other employees not engaged in safety sensitive tasks, *Nat'l Treas-*

ury Employees Union v. Hallett, 756 F.Supp. 947 (E.D. La. 1991). Indeed, no court has ever upheld a drug testing program for individuals whose activities do not affect safety, except for a Seventh Circuit case whose reasoning has been questioned even within that Circuit. *See Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052 (7th Cir. 2000) (criticizing *Todd v. Rush County Schools*, 139 F.3d 571 (7th Cir. 1998)).[6]

2. In analyzing the safety concerns at issue here, the words of the Court in *Chandler* are again *apropos*: "Notably lacking in [petitioners'] presentation is any indication of a concrete danger demanding departure from the Fourth Amendment's main rule. Nothing in the record hints that the hazards [petitioners] broadly describe are real and not simply hypothetical . . . ." *Chandler*, 520 U.S. at 318-19.

The court of appeals concluded that the evidence showed no appreciable risk of injury due to participation in non-athletic activities subject to drug testing. Pet. App. 23a. The district court did not disagree. Pet. App. 59a-60a. The School Board did not even consider safety as a rationale for including non-athletes in its policy. J.A. 155. Principal James Blue confirmed that in his many years as principal, there had been no drug-related injuries or deaths. C.A.

[6] The Eighth Circuit mimicked *Todd*'s flawed reasoning in *Miller v. Wilkes*, 172 F.3d 574, 578 (8th Cir. 1999), focusing overwhelmingly "on the privacy side of the scale." That decision has since been vacated. 1999 U.S. App. Lexis 13289 (June 15, 1999). Petitioners expend some effort in their brief to explain the positions of lower courts on drug testing. Pet. Br. at 29-33. They neglect to mention the several recent cases striking down student drug testing. The court of appeals in this case, however, reviews these rulings accurately and in detail. Pet. App. 26a n.14. Petitioners also mistakenly suggest that the Fifth Circuit has upheld drug testing of school teachers, Pet. Br. at 33, when the opposite is true, *see United Teachers v. Orleans Parish Sch. Board*, 142 F.3d 853 (5th Cir. 1998).

App. 162. Nonetheless, petitioners now list the following hypothetical safety concerns: (1) Band members "perform extremely precise routines with heavy equipment and instruments in close proximity to other students"; and (2) some FFA competitions involve large animals. Pet. Br. at 43. Notably, the District makes no claims at all of dangers for the Choir, Future Homemakers of America or Academic Team. Turning then to the claimed dangers of Band, the Board President flatly contradicted the argument now made by the District's attorneys, affirming that "any danger of [Band members] seriously injuring themselves or other people [was] not a reason for this drug testing policy for the Band." J.A. 77. The prospect of Band students walking into one another, even if one is carrying a trombone and the other a snare drum, bears more resemblance to the normal high school activities of walking through a crowded hallway on the way to class than to being tackled by a linebacker during a football game. Indeed, the School admits that it has no knowledge of any injuries caused by participating in the Choir, Band, Future Homemakers of America or Academic Team. J.A. 50.

Petitioners end up resting their safety argument on the fact that one FFA student and one FFA adult judge have suffered minor injuries during the past thirty years when large livestock have escaped the control of a student. Pet. Br. at 39; J.A. 81. This is surely a rate of injury considerably lower than occurs in any high school athletic program. If the School is genuinely concerned that drug impairment would cause a student to lose control of an animal, it defies logic that the School would allow smaller children to handle precisely these same animals, knowing that the animals will predictably "get loose." J.A. 80. Moreover, handling of livestock is a regular class activity, not triggering drug testing unless also pursued in competitions. C.A. App. 693. Finally, whatever the degree of risk posed by large livestock competitions, it does not justify drug testing all FFA stu-

dents, much less all extracurricular students. Many FFA students engage in competitions posing no imaginable safety hazard: speech, floriculture, horticulture, and small animal competitions. J.A. 79, 117-18.

Finally, petitioners argue that the lack of supervision of students during overnight travel raises a safety issue for non-athletic competitive activities. Pet. Br. at 43-46. This red herring should be dismissed out of hand. First, no drug tests are imposed upon the numerous students who travel off-campus for reasons other than extracurricular competitions, including field trips by the Student Council, the FFA class trips to Kansas City and St. Louis, Future Homemakers of America field trips to ring bells outside Wal-Mart, the Band class trip to Six Flags amusement park in Texas, the math club trips to Six Flags and to a Colorado ski resort, field trips by the Beta Club, French Club, Spanish Club, and Mu Alpha Theta organization, off-campus reporting by school newspaper members, workshops and fund raising activities by yearbook members, community events by members of the Leadership activity, and a variety of field trips associated with academic classes, including a visit to a local prison. J.A. 39 (admitting allegation of Compl. ¶34(b-c, e)), 40 (admitting allegations of Compl. ¶34(i-m) and ¶35), 45, 62, 83; C.A. App. 559-61, 671. The District admits that these students, none of whom are subject to drug testing, "sometimes share sleeping accommodations during [their] travel; and that during such travel students are sometimes allowed free time to journey into the surrounding area without adult supervision." J.A. 62. Moreover, the School maintains an open campus, C.A. App. 510, allowing *every* student to drive to Shawnee, a nearby town, for their daily lunch break. C.A. App. 512. Petitioners suggest that the School's safeguards against drugs (cameras, guards, etc.) are uniquely unavailable for students traveling to competitions, Pet. Br. at 45, but the record is clear in showing that virtually all students leave campus for a varicty of reasons.

Second, the drug test cannot be credibly viewed as responding to the dangers of leaving campus, since many students who never end up traveling for competitions must take the drug test upon signing up for a competitive activity. Some are fortunate enough to travel to out-of-state competitions, but many engage in such purely local activities, J.A. 117, or competitions hosted by Tecumseh -- activities that raise none of the supervisory concerns claimed by petitioners.

Third, the District made no showing that drugs were likely to be used on the trips for competitions or had even once been found on such a trip. Since special needs must rest upon a "concrete danger demanding departure from the Fourth Amendment's main rule," *Chandler*, 520 U.S. at 319, the District's one plausible safety issue turns out to be nothing more than another *post hoc* rationalization for a policy proposed and implemented without reference to students' safety. Petitioners' counsel have embraced the need to protect traveling students as a safety-related rationale for the policy, but this reason was never considered by the Board, and the enacted Policy has little nexus to the claimed hazards of off-campus travel.

The District seeks to respond to the record here with a claim that *Vernonia*, while explicitly addressing the demonstrated hazards faced by the plaintiff football player and his many teammates, implicitly endorsed the drug testing of a handful of golf players who engage in a sport petitioners suggest is hazard free. Pet. Br. at 42 n.25; *but see* Todd Purdum, "Caution: Presidents at Play," N.Y. Times, Feb. 16, 1995, §A, at 1 (former U.S. Presidents injure spectators with errant golf balls). With reasonableness being the ultimate touchstone, a line between athletes and non-athletes makes sense. The *Vernonia* decision concerns an overwhelming majority (if not complete unanimity) of athletes proven to use drugs, proven to engage in dangerous activi-

ties, and proven to be subject to injury in those activities. Here, the overwhelming majority (if not complete unanimity) of non-athlete students engage in perfectly safe activities.

D. Tecumseh Has Not Demonstrated A Level Of Drug Use Amounting To A Real And Immediate Interest Sufficient To Override Students' Fourth Amendment Rights Against General Searches

Given the lack of safety concerns as a foundation for drug testing here, a current drug problem among the students being tested becomes indispensable in demonstrating a real and immediate governmental interest. This inquiry into past drug use makes sense, given that random drug testing ousts the usual Fourth Amendment requirement of individualized suspicion. We first address the lack of any evidence of drug use among the non-athletes targeted by the School's Policy -- a fact that alone suffices to conclude that the District fails to meet the "real and immediate interest" prong of the *Vernonia* test. Next, we demonstrate that drug use and discipline problems in the School as a whole were minimal. Finally, we address petitioners' argument that the District need not prove any *current* problem so long as it articulates goals of generalized deterrence of drug use.

1. Based on a record of undisputed facts, the court of appeals concluded that evidence of "drug use . . . among students subject to the testing Policy was negligible," indicating none of the "discipline problems" found in *Vernonia*. Pet. App. 19a. The district court and the dissenting judge in the court of appeals did not disagree with this assessment.[7]

[7] The district court concluded that the evidence presented by the District and discussed herein demonstrated that there was no "drug problem of epidemic proportions, or a student body in a state of rebellion," Pet. (continued...)

As petitioners admit, the participants in non-athletic activities are "not the leaders of any drug culture," J.A. 64-65, as was true of the athletes in *Vernonia*, 515 U.S. at 662-63. The record shows, moreover, that the School has never even suspected drug use by a single one of the non-athletes subject to this drug testing policy. All witnesses agree that the non-athletes subject to the School's drug testing are distinctly less likely to use drugs as compared to other students. The School Board President, for example, observed that the majority of students who use drugs or alcohol do not join extracurricular activities, J.A. 100-01, while all three activity teachers who testified in this case -- individuals who have the greatest daily contact with these students -- agree that drug use among extracurricular participants is lower than among the student body as a whole. The Choir teacher has never caught a Choir member with drugs in 29 years of teaching, and asserts that drug users tend not to join. J.A. 125, 127. The Future Homemakers of America teacher observed that the students who talked about drugs in her classes were "kids that I don't think would have had any desire to compete" in Future Homemakers of America competitions, J.A. 116, and so she has never suspected an extracurricular Future Homemakers of America student of using drugs. C.A. App. 673. Likewise, the FFA teacher, although noting that some of his *class* members have occasionally been "listless," proffered no instance of suspected drug use among extracurricular students and stated that FFA activity participants were less likely than other students to use drugs. J.A. 119. Only three athletes have tested posi-

[7] (...continued)
App. 61a, and reached no conclusions on the level of drug use among non-athletes subject to the drug testing policy. *Id.* at 77a. The dissent in the court of appeals took a similar approach, conceding that drug use in the school generally fell short of the *Vernonia* "crisis" and pointing to no evidence of drug use by non-athletes. Pet. App. 38a.

tive in the entire two years of the drug-testing program's operation. J.A. 107; C.A. App. 570-74. The record is utterly barren of any evidence of drug use by the non-athlete students targeted under the District's challenged policy.[8]

In order to suggest that drug use does exist among the non-athlete students subject to this Policy, petitioners assert: "Respondent James also talked to twelve students about their own drug use, half of which he believed were engaged in extracurricular activities." Pet. Br. at 7. The record does not support this inventive use of deposition testimony. James' testimony makes clear that the *only* activity engaged in by these twelve drug-using students is "HOPE, if you can call that an extracurricular activity." J.A. 124. HOPE, or Life Guides as it is also known, is a youth group run by a non-faculty member; it is not a competitive activity and is not subject to drug testing. Record, Defs.' Statement of Uncontested Fact in Support of S.J. Motion, ¶34. James further stated that all of the students he knows to use drugs "hang out in the park." J.A. 124. When asked if "these people who hang out in that park, are they the people who do extracurricular activities," James replied, "none of them." J.A. 124.

The Court's inquiry into drug use as a justification for a special need finding should end with the conclusion that no drug use has been shown or suspected among the students who engage in non-athletic extracurricular activities. The relevant analysis of drug use should focus on the students

[8] Petitioners point to an interrogatory response claiming that school counselors "would testify" to students having sought counseling over drug use. As the court of appeals rightly concluded, "[t]he circumstances and details surrounding these incidents do not appear to have been developed more fully with additional evidence, nor is there any indication that any of the students, at least at the high school level, were involved in extracurricular activities." Pet. App. 16a-17a.

actually targeted by the policy. In a similar vein, the Court in *Skinner* examined drug and alcohol use among train drivers subject to drug and alcohol testing, not all railroad employees, 489 U.S. at 602, and in *Von Raab* examined drug use among the drug interdiction officers subject to drug testing, not all Customs Service employees, 489 U.S. at 656. But, as we show below, even petitioners' attempt to show a drug problem in the overall student population fails to find credible support in the record.

2. The court of appeals concluded and the record confirms that evidence of drug use in the school as a whole was "minimal," Pet. App. 14a, far short of the "epidemic" use found in *Vernonia*, 515 U.S. at 663.[9] Petitioners seek to inflate the evidence, pointing selectively to snippets of the record to hypothesize a school-wide, decades-long drug problem. Again, the record shows otherwise.

Only two sources evaluate the school's overall drug use in an evenhanded manner, unbiased by the process of litigation. First, the school has spoken for itself under a legal obligation to tell the truth in a context where it has no incentive to exaggerate or minimize drug use. In its annual application for funds under the Safe and Drug-Free Schools and Communities program, the District was directed to submit an analysis of current use, as follows: "Needs should be identified using *objective measures* (dat[a] bases), *rather than using subjective measures (opinions)*." J.A. 176 (emphasis added). The District complied with these instructions, making use of "annual drug use and violence surveys," a tool it deemed to provide "useful information" and a means "to more objectively evaluate the extent of drug, alcohol and tobacco use among our students." J.A. 186. *See*

[9] The district court makes no effort to quantify the level of drug use overall, other than to find it to be less than "epidemic." Pet. App. 61a.

C.A. App. 366 (Assistant Superintendent testified forms contained accurate information).

As far back as 1989, the District surveys found "continued use and abuse of alcohol." J.A. 164. The District's own observations at the time confirmed survey reports that it had "very few" drug incidents over the previous two years. J.A. 165. The following year found alcohol use "steady" but drug use "going down," with drug education having such a "positive impact" that the District had "very few" drug incidents. J.A. 168. The District reached identical conclusions in 1991, J.A. 171, and then in the 1993 application the District concluded that less than five percent of its students had used marijuana or any other drug. J.A. 176. This figure is dramatically below the national surveys showing almost half of students nationally having used drugs. *See* Brief of U.S. at 2, and sources cited therein.

In 1995, the District further elaborated on its assessment, stating, "the use of the surveys has provided us with information concerning alcohol as our number one problem. Our students express that the main use is alcohol on the weekends. We have not found other types of illegal or controlled substances to be a major problem although they do exist." J.A. 180. The District concluded, "it is our belief that most youth do not use drugs." J.A. 181. Again in 1996, the District found tobacco and alcohol to be "our number one problems," while other drugs still had "not identified themselves as major problems at this time." J.A. 186.

Notably, in each of the two years preceding enactment of the drug testing policy, the District reached identical conclusions of minimal drug use and minimal disciplinary problems. Alcohol and tobacco remained the "number one problem," and other drugs were not "major problems." J.A. 186, 191. As for petitioners' claim that discipline problems might justify its drug testing Policy, the District reported

that "[m]inimal problems have been experienced due to violence, safety and discipline problems," J.A. 186, 192, and that "discipline policies in place at each site have been effective in dealing with the problems." J.A. 192.

Petitioners' brief makes no mention of its own prior statements in the federal applications, and the United States in its brief seeks to shunt aside these key admissions as somehow unreliable. Brief of U.S. at 23 n.7. On the contrary, what should be viewed as less reliable are the self-serving statements generated as part of this litigation. The federal reports are the single most reliable indication of the school's own view of the scope or severity of its drug problem *at the time it implemented its drug testing policy*. The Solicitor General calls for "appropriate deference to the judgments of local school officials as to the severity of the problem," U.S. Br. at 24, and this is precisely why the federal reports by local school authorities should be credited and why the post-enactment contentions of the School's lawyers deserve little weight.

Second, beyond the federal reports, the School maintained a record of drug-related incidents prior to this present litigation. These records were no haphazard collection of anecdote, but were tied to a strict District policy that "[a]ny case involving violation of th[e] policy [prohibiting drug use, distribution or possession] is to be reported immediately to the principal or school official in charge," who would then impose specific disciplinary measures. J.A. 191. The records of these disciplinary reports show only two drug-related incidents. First, in the 1997-98 school year, immediately prior to the District's adoption of its Policy, the record shows that one student was disciplined for "small particles and seeds of marijuana" found in a car. Pet. App. 58a; J.A. 103; C.A. App. 581. The student was not an extracurricular participant, was not drug tested as a result of this incident, and is now in good standing. C.A. App. 580-84. Second,

several marijuana cigarettes were found by a drug dog under a log at the boundary of an unfenced school parking lot that was easily accessible to the general public. J.A. 101-02. The school never determined that the cigarettes belonged to a student, and no student was disciplined. *Id.* The Assistant Superintendent, who drafted the drug testing policy, confirmed that, to his knowledge, no other drug incidents had occurred beyond the two documented in the School's disciplinary records. J.A. 140.

Rather than relying on the School District's own surveys, reports and disciplinary records, petitioners prefer to piece together anecdotes and rumor. This same effort previously led the court of appeals to conclude that the School District made "assertions [that] involve distortions of the record in this case." Pet. App. 18a n.9.

Petitioners' narrative of Tecumseh drug use relies largely on the deposition testimony of Dean Rogers, the School Board President. Petitioners make no suggestion that the Board or District relied on Ms. Rogers' anecdotal accounts in formulating or enacting the Policy. Without revisiting each of these second- or third-hand accounts, a few instances suffice to demonstrate the kind of use petitioners make of the record. For instance, as evidence of a drug problem in the 1970's, petitioners refer, without elaboration, to "a Band student who offered another Band student 'pills.'" Pet. Br. at 4. Ms. Rogers did indeed testify that her daughter had been offered pills on the school bus by another Band member three decades ago, but she also acknowledged that she did not know whether the pills were aspirin, narcotics, or something else entirely. J.A. 72.

Similarly, Ms. Rogers' claims to have found drug paraphernalia in her home during the late 1970s, apparently left behind by a friend of her son who played high school football. She did not find any drugs. J.A. 92. The "paraphernalia" consisted of items that she believes could be used for

"marijuana, LSD, or crack." *Id.* According to her testimony, however, she had no idea how LSD is consumed, *id.* (no paraphernalia is needed); and it is quite unlikely that she found a crack pipe in 1978, since crack was not used with any frequency in the United States until the mid 1980's. Ms. Rogers testified, as well, that her son confessed his own marijuana and Quaalude use to her almost twenty-five years ago. J.A. 92, 100.

Much more to the point is the sort of information that actually came before the Board. While that information may have been less dated, it was no more persuasive. At best, it suggested a minimal amount of drug use, none of it connected to the non-athletes engaged in extracurricular activities,[10] much of which apparently occurred outside of school,[11] and all of which took place during a time when the school district submitted annual forms to the federal government reporting "very few" drug incidents.

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[10] Petitioners point to the testimony of three teachers. Pet. Br. at 5. Mr. Sterling suspected drug use by students in FFA class "probably three or four times" during the "last five years," C.A. App. 711-12, on nothing more substantial than their "listless" attitude and in only "one situation . . . the aroma of pot," J.A. 119, though he never found drugs or disciplined any of these classroom students. *Id.* Mrs. Daugherty initiated only a single drug-related disciplinary referral in 29 years of teaching and never caught a student with drugs. J.A. 127. The third teacher, Mrs. Evans, did not testify to having ever disciplined or caught a student for drug use, observing only that she overheard some students talking about marijuana in her class. J.A. 115-16.

[11] As a high school peer counselor, respondent Daniel James was particularly likely to encounter students using drugs, and testified that he had observed or been told of some drug use by twelve students. Petitioners make much of this testimony. However, as the district court correctly noted, Daniel was referring to drug use at parties he had attended, rather than at school or at official school functions. Pet. App. 58a n.14. Further, none of these students engaged in extracurricular activities. *Id.*; *see also* J.A. 124.

3. Petitioners and the Solicitor General respond to the absence of any evidence of drug use among non-athletic extracurricular students and the scant evidence of drug use by students overall, claiming that none of this matters. They argue that aspirations for a drug-free school justify prophylactic drug testing. As well intentioned as this goal may be, it presupposes a radical reformulation of Fourth Amendment law: under this theory, a school should be allowed to conduct general searches when it has *no* reason to believe it faces a current problem because deterrence and preservation of the school's good reputation alone justify putting aside the protections of the Fourth Amendment against general searches. As we show below, a history of drug use has always played an important part in evaluation of a special need, and the suggestion that the Court should dispense with showing *any* real and immediate governmental concern would invite drug testing of every student in every school, running directly contrary to *Vernonia* and every other special needs or school case previously decided by the Court.

a. Petitioners suggest and the Solicitor General argues strenuously that *Von Raab* stands for the proposition that drug testing regimes should be upheld despite the absence of prior drug use among those being tested. Pet. Br. at 22-23; Brief of U.S. at 21. Yet, the Court has made clear that such reliance on the Court's decision in *Von Raab* is misplaced:

> Hardly a decision opening broad vistas for suspicionless searches, *Von Raab* must be read in its unique context. As the Customs Service reported in announcing the testing program, [Customs employees], more than any other Federal workers, are routinely exposed to the vast network of organized crime that is inextricably tied to illegal drug use. We stressed

> that drug interdiction had become the agency's primary enforcement mission, and that the employees in question would have access to vast sources of valuable contraband. Furthermore, Customs officers had been the targets of bribery by drug smugglers on numerous occasions, and *several had succumbed to the temptation.*

Chandler, 520 U.S. at 321 (internal quotation marks, alterations, and citations omitted)(emphasis added).

Here, students like Lindsay Earls share none of the characteristics of the armed customs agents in *Von Raab*. These choir girls and school debaters are a world apart from a group of federal agents who routinely faced and some of whom had fallen prey to drug-fueled corruption. *Von Raab* stands only for the proposition that, in the absence of a history of drug use, a special need nonetheless may be founded upon exposure to or corruption by drugs, coupled with serious threats to public health and safety.

As a final effort to square the record of minimal drug use in this case with the Court's finding in *Vernonia* of a drug "epidemic," petitioners and the Solicitor General invite the Court to ignore its own words in favor of a reexamination of the details of the lower court record in *Vernonia*. Pet. Br. at 25; Brief of U.S. at 23-24. They argue that the Court should now pay no heed to its factual descriptions in *Vernonia*, all of which were relied upon and quoted by the court of appeals in the present case: the "sharp increase in drug use," "more disciplinary problems," the fact that "athletes were the leaders of the drug culture," the "administration was at its wit's end," "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion," disciplinary actions were "epidemic," there was a "threefold increase in classroom disruptions and disciplinary reports," "the staff's direct observa-

tions of students using drugs," and a "rebellion fueled by alcohol and drug abuse." Pet. App. 10a-11a (quoting *Vernonia*, 515 U.S. at 649). The School would dispense with these repeated and consistent statements as unsupported by the record from the *Vernonia* district court. But the Court's own opinion unmistakably relies upon historical drug use among the targeted students as a critical element in its decision. As stated by the court of appeals in the present case, "[o]ne cannot read [*Vernonia*] and not appreciate that those factual findings regarding the existence of a documented drug problem among students subject to the drug testing were very important to the majority." Pet. App. 11a n.5.

b. This Court's Fourth Amendment jurisprudence does not support the notion that a governmental desire to promote lawful conduct can alone justify intrusive, suspicionless searches in the absence of a specific safety rationale. This is not because deterrence is unimportant. It is because a holding that deterrence alone is sufficient to override the Fourth Amendment command of individualized suspicion would allow the exception to swallow the rule. Thus, in *Vernonia*, the Court referred to the "nature and immediacy of the governmental concern at issue . . . ." 515 U.S. at 660. The test is not disjunctive; the school is obliged to show both that the nature of the concern is important *and* that the concern is immediate. In embracing the single goal of generalized deterrence, the District neglects the "immediacy" requirement. Pet. Br. at 48-49; *see also* Brief of U.S. at 18 (the "interest in deterring drug use in schools is alone sufficient to justify a drug-testing policy like the one at issue here").

General deterrence alone cannot be the rationale for putting aside Fourth Amendment norms, especially where the government lacks immediate safety concerns. Most any misconduct would be better deterred if the State were empowered to search any of us at any time. The fear of dis-

covery would undoubtedly lead to greater compliance with government rules. But the Fourth Amendment was enacted to stand against precisely this dangerous logic. The same could be said of the government's ambition to deter drug trafficking in *Edmond*. The wider the net cast by a search, the greater the deterrence -- but the greater also the danger of contravening the Fourth Amendment.

E. The School's Drug Testing Policy Is Not Effective In Addressing A Proven Problem

Addressing the final prong of the *Vernonia* analysis, it is not enough that the government merely articulate a real and immediate interest: the proposed scheme must also effectively further that proffered interest. *Vernonia*, 515 U.S. at 660; *see also Edmond*, 531 U.S. at 42-43 (overturning a road block for lack of a "close connection" between the group searched and the government's concern); *Chandler*, 520 U.S. at 314 (noting the "documented link" in precedents between the tested group and the safety concern at issue); "Recent Cases," 112 Harv.L.Rev. 713, 716 (1999)(noting that suspicionless drug testing is reasonable under Supreme Court precedent "only to the extent that there is a recognizable correlation between the targeted group and the problem to be addressed"). The Policy here is not responsive to any identified problem of drug use or safety, least of all *in the group actually being tested*. *See Edmond*, 531 U.S. at 42 (striking down generalized seizure despite truism that "traffic in illegal narcotics creates social harms of the first magnitude"). A proper governmental drug testing program must focus with some precision on the group for which specific evidence indicates a particularized need.

1. The District misconstrues the need to show the efficacy of a drug testing program. More than simply demonstrating that the drug tests are conducted competently, the

program design must be reasonably calculated to prevent harm caused by drug use. A program that singles out students based on the likelihood that they do not use drugs and are not engaged in dangerous activities,[12] while leaving alone the disengaged, disinterested students who are more likely to use drugs, can hardly be deemed effective. Indeed, the Policy serves to deter these disengaged students from joining the Choir, Band or other such positive activities, encouraging them instead to remain idle and therefore more prone to destructive behavior. For this reason, the involuntary drug testing of school children has been opposed by both pediatricians and teachers. *See* Brief of *Amici Curiae* American Academy of Pediatrics, *et al.*

Vernonia upheld a specifically targeted policy: "It seems . . . self-evident that a drug problem largely fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs." 515 U.S. at 663. In the instant case, by contrast, the District's policy makes no pretense of tailoring the scope of its solution to the problem at hand. It defies logic to suggest that a scheme aimed at the students least likely to be drug users could be an effective means of curbing drug use at the High School.

Further, both the need and the efficacy for drug testing athletes in *Vernonia* grew from the fact that many students mimic the drug-taking behavior of athletes. *See Vernonia*, 515 U.S. at 663. The non-athlete students targeted here, in sharp contrast, are hardly role models for the social behavior of other students. As in virtually every high school, Tecumseh's athletes, rather than students in its Choir or Academic Team, are the "cool kids" whose social behavior other students strive to emulate. The Choir teacher confirms this view,[13] and the district court refused to find otherwise. Pet. App. 76a. While some students may admire Academic Team members for their ability to excel in quiz bowl competitions, there is no evidence that the Academic Team sets the standard for *social* activities within the school.

[12] Many activities posing significantly greater dangers than the Choir, Band and the like take place in the classroom and are not subject to drug testing. *See, e.g.*, J.A. 62-63 (driving vehicles in Drivers' Education class, using power cutting tools in Agriculture classes, using certain chemicals in chemistry class); J.A. 152-53 (welding in mechanics class).

Finally, the proffered test does not screen for alcohol or tobacco, J.A. 70 -- the most commonly used and lethal drugs in the school and its self-professed "number one problem," J.A. 186, 191, or for LSD, Ecstasy, or steroids, J.A. 70, 141. Of the six drugs the test does screen for, only marijuana remains detectable in urine for a long enough period that the test would likely discover its use. J.A. 70, 142. The limitations of the drug test in detecting substances other than marijuana pose a perverse incentive for students who do use drugs to shift from marijuana to use of more dangerous drugs like heroin or cocaine. *See* Brief of *Amici Curiae* American Academy of Pediatrics, *et al.*

2. The most telling hallmark of lack of efficacy comes in the District's acknowledgment that its Policy serves, in no small measure, purely *symbolic* purposes. Pet. Br. at 46 n.27; *see also* Brief of U.S. at 19 ("school district has a strong interest in seeing that those who represent [it] are not an 'embarrassment' to the school and community").

As *Chandler* demonstrates, a drug-testing program that fails to respond to demonstrated problems of drug use or safety can stem instead from a symbolic desire to project a public image of being "tough on drugs." Where, as here, a

[13] When asked, "Who would be the cool students that everybody wants to imitate?", the Choir teacher responded, "I would like to say the Choir students, but I really think it's probably the jocks." J.A. 129.

governmental body imposes suspicionless drug testing not because of an identifiable problem, but rather as part of a generalized opposition to drug use, the teaching of *Chandler* is clear: drug testing in the name of symbolism simply cannot trump the Fourth Amendment's assurance that all of us, absent specific reason to believe we have committed some wrong, will be spared the invasive indignity of a governmental search.

Tecumseh readily admits that it imposes drug tests on non-athletes who "represent" the school in public for the following reasons: (1) "send[ing] a message to the community about the school's tough on drugs stance," J.A. 91; C.A. App. 361; (2) "projecting . . . a drug-free image," J.A. 154; (3) avoiding "embarrassment to the school" J.A. 78; (4) continuing the Choir's, Band's, and Academic Team's records of winning competitions, J.A. 79; and (5) fostering the appearance of fairness to athletes subject to testing. J.A. 89.

In *Chandler*, the Court ruled that the desire to project a drug-free image is not a legitimate reason for suspicionless testing. 520 U.S. at 321. In striking down Georgia's drug testing of candidates for public office, the Court stressed the sharp divide between symbolic and special needs: "What is left, after close review of Georgia's scheme, is the image the State seeks to project. By requiring candidates for public office to submit to drug testing, Georgia displays its commitment to the struggle against drug abuse." *Id.* Absent any "evidence of a drug problem among the State's elected officials" or performance of "high-risk, safety-sensitive tasks," the governmental "need revealed, in short, is symbolic, not 'special,' as that term draws meaning from our case law." *Id.*

Like Georgia's desire to display its commitment to the struggle against drugs, the District's purposes of sending a tough-on-drugs message to the community and of projecting

a drug-free image are wholly symbolic, not special, needs. Similarly, the desire to avoid embarrassment stems far more from the concern of safeguarding Tecumseh's image rather than of safeguarding its students from any drug problem. Finally, the District's unwarranted expansion of its scheme to non-athletes in order to appear fair to athletes underscores the scheme's symbolic rather than substantive purpose. Non-athletes were added to Tecumseh's policy, which initially targeted only athletes, with no deliberation whatsoever as to whether these students had any history of drug use, J.A. 155: instead, board members reeled off "pet" organizations to subject to testing. J.A. 89. Tecumseh's desire to lend its actions the gloss of evenhandedness cannot serve to subject to search a broad group of non-athlete students never suspected of drug use. In sum, not one of the District's proffered interests is cognizable as a legitimate reason for suspending Fourth Amendment protections.

III. THE SCHOOL'S CALL FOR CLEAR GUIDANCE IN DESIGNING DRUG TESTING REGIMES DOES NOT JUSTIFY ABANDONING THE FOURTH AMENDMENT PROTECTION AGAINST GENERAL SEARCHES

Petitioners (and their *amici*) insist that, even lacking any evidence of drug use and special dangers, the Court should chart new territory in creating a bright line rule that would effectively allow drug testing of any student in any extracurricular activity, or perhaps any student at all.

First, as the Court recently pointed out, the reasonableness component of the Fourth Amendment is necessarily "abstract" and not easily "reduc[ed] to 'a neat set of legal rules.'" *United States v. Arvizu*, 534 U.S. __, 122 S.Ct. 744, 751 (2002)(quoting *Ornelas v. United States*, 517 U.S. 690, 695-96 (1996), and *Illinois v. Gates*, 462 U.S. 213, 232

(1983)). The special needs doctrine, in particular, involves an evaluative process, the details of which are worked out by the lower courts: "courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Chandler*, 510 U.S. at 314; *see also Ferguson*, 532 U.S. at 81 ("In looking to the programmatic purpose, we consider all the available evidence in order to determine the relevant primary purpose"). For instance, following the decisions in *Skinner* and *Von Raab*, it was clear that drug testing in the governmental workplace must be based on some measure of safety sensitivity, but litigation has been needed to clarify the parameters of workplace drug testing for safety sensitive positions.

Perhaps most fatal to petitioners' insistence on the need for a bright line rule is the fact that *T.L.O.* itself requires a school to make a number of judgments concerning reasonableness, and school officials have functioned effectively under that standard since 1985. *T.L.O.* offers no bright line or mechanical rules, but it leaves schools entirely capable of managing their discipline problems without undue fear of litigation.

The Court should not accept petitioners' invitation to chart new territory by allowing for a generalized drug test while dispensing entirely with the need to show any history of drug use or significant safety concerns. Petitioners echo the district court's reliance upon all-embracing statements regarding the ill effects of drugs in society and schools in general. Pet. App. 61a-62a. Even if one were to accept the frail premise that drug testing deters drug abuse (and petitioners have failed to adduce any evidence on this point), the district court's approach would transform the special needs doctrine into a blank check for privacy intrusions in the name of fighting drugs. The Court twice rejected that approach just last Term. *See Edmond*, 531 U.S. 32; *Ferguson*, 532 U.S. 67. Generalizations about the nation's schools cannot substitute for a reasoned analysis of the facts relating specifically to Tecumseh. These are precisely the kinds of vague governmental needs that the Court sought to guard against through *Chandler*'s requirement of a "concrete danger demanding departure from the Fourth Amendment's main rule." 520 U.S. at 319.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

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Dated: February 6, 2002

(16)

Supreme Court U.S.
FILED
MAR 6 2002
OFFICE OF THE CLERK

No. 01-332

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY and INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY,

Petitioners,

v.

LINDSAY EARLS and LACEY EARLS, minors, by their next friends and parents, John David and Lori Earls, and DANIEL JAMES, a minor, by his next friend and mother, Leta Hagar,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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24 pp

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
STATEMENT OF THE CASE.....	1
ARGUMENT	8
1. Proof of an Extraordinary Drug Problem is Not Required in Order to Establish Tecumseh's Status as a Special Needs Environment.....	8
2. Tecumseh Students Engaged in Competitive Activities Have a Diminished Expectation of Privacy.	12
3. The Character of the Intrusion Implicated by Tecumseh's Policy is Negligible.	14
4. The Nature and Immediacy of Tecumseh's Concern are Important Enough to Justify the Search at Issue.....	15
5. *Vernonia* Remains the Controlling Authority to Determine the Constitutionality of Tecumseh's Policy.	19
CONCLUSION.....	20

TABLE OF CITED AUTHORITIES

CASES — Page

Bluestein v. Skinner, 908 F.2d 451 (9th Cir. 1990) 6
Chandler v. Milier, 520 U.S. 305 (1997) 11
City of Indianapolis v. Edmond, 531 U.S. 32 (2000) 11
Ford v. Down, 931 F.2d 1286 (8th Cir. 1991) 7
Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989) Illinois ex rel. McCollum Board of Ed. of School Dist. No. 71, 333 U.S. 203 (1948)... 6
Lee v. Weisman, 505 U.S. 577 (1992) 6, 13
National Fed'n of Fed. Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989) 6
New Jersey v. TLO, 469 U.S. 325 (1985) 11
Rushton v. Nebraska Public Power District, 844 F.2d 562 (8th Cir. 1988) 6
Saanedra v. Albuquerque, 73 F.3d 1525 (10th Cir. 1996) 7
Skinner v. Railway Labor Executives Assn., 489 U.S. 602 (1989) 6
Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989) 6
Treasury Employees v. Von Raab, 489 U.S. 656 (1989) 6
Vernonia School District 47J v. Acton, 515 U.S. 646 (1995) 8, 11, 12, 13, 15, 20

STATUTES

Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C.A. § 31301 7

TABLE OF CITED AUTHORITIES—Continued

MISCELLANEOUS — Page

"Tecumseh, Oklahoma High School Senior is Among 12 Winners of ACLU College Scholarship for Youth Activism," http://www.aclu.org/news/2001/n052301a.html 1
"School Board Will Discuss Drug Testing," http://www.tecumsehok.com/CountyWide/980820d.htm 2
"School Board to Consider Drug Testing," http://www.tecumsehok.com/CountyWide/980827d.htm 2
"Parents Want Student Drug Testing Now...," http://www.tecumsehok.com/CountyWide/980903b.htm 2
"American Civil Liberties Freedom Network–Drug Testing of Workers Keeps Rising," http://www.aclu.org/news/w011298b.html..... 7
"Drug Tests at Work Can Be Hair Raising," http://www.sunone.com/news/articles/02-08-00e.shtml 14
"MDMA, ONDCP Drug Policy Information Clearinghouse, Fact Sheet, July 2000," http://www.whitehousedrugpolicy.gov/publications/pdf/ncj181141.pdf 16

STATEMENT OF THE CASE

This action was initially filed on behalf of two students, Respondent Lindsay Earls ("Lindsay") and Respondent Daniel James ("Daniel").

Respondents tell us Lindsay now attends Dartmouth. (Brief, 4).[1] They mention, by footnote, that Daniel has enlisted in the United States Armed Forces. (*Id.*, note 4)

Respondents' Statement of the Case details Lindsay's life at Tecumseh, where she rarely attended parties or dated. (Brief, 4). Tecumseh does not dispute that Lindsay maintained a lifestyle of modesty and propriety during her high school years and worked diligently in order to be admitted to Dartmouth.[2]

Respondents infer that all students in Competitive Activities are "a group of well-behaved students" just like Lindsay. (Brief, 14). It is naive to suggest, as Respondents suggest, that all students engaging in Competitive Activities do not party, date or know what marijuana looks like. (Brief, 5).

Unlike Lindsay, Daniel did go to parties with other Tecumseh students. In a year and a half, he observed approximately twelve Tecumseh students under the influence at those parties. (J.A. 123). The record also shows that during his short tenure as a Tecumseh student, Daniel's school experience was vastly different from Lindsay's experience in the areas of discipline (C.A. App. 83, 84, 1048, 1050) and academics (J.A. 68, 69; C.A. App. 222). Daniel

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[1] Brief of Respondents, hereinafter referred to as "Brief".

[2] Tecumseh is proud of the fact that Lindsay was the recipient of a scholarship in order to attend such a prestigious college. (*See*, "Tecumseh, Oklahoma High School Senior is Among 12 Winners of ACLU College Scholarship for Youth Activism," *available at* http://www.aclu.org/-news/2001/n052301a.html).

never met the O.S.S.A.A. academic eligibility standards to compete on Tecumseh's Academic Team, which he alleged suspicionless drug testing restrained his "right" to pursue. (J.A. 18, 19). In spite of his academic ineligibility, he was able to remain in the Academic Team class and participate in all the noncompetitive activities associated with it. Likewise, refusing suspicionless drug testing under the Policy would not have affected his attendance and participation in the class activities.

During his time at Tecumseh, Daniel counseled other students about the perils of drug abuse (J.A. 17, 18) and, in that role, talked to other Tecumseh students about their past and current drug use. (J.A. 122, 124). The Life Guides program in which Daniel was a member is a collaboration between Tecumseh and the Youth and Family Resource Center to deter and combat drug use. (C.A. App. 60, 935). For Respondents to say that Tecumseh has no drug problem contradicts Daniel's own testimony that he observed about a dozen students under the influence of drugs (J.A. 123), as well as his knowledge of students at the park doing drugs (J.A. 124) [3], and of at least two students who attended drug rehabilitation programs during his short tenure at Tecumseh. (J.A. 123).

The school records and lifestyles of Lindsay and Daniel evidence the reality that a wide variety of students engage in extracurricular activities and some of those students want to engage in Competitive Activities. Similar to the general

[3] In contradiction to Daniel's opinion that the students who hang out in the park adjacent to the school do not participate in extracurricular activities, the High School Principal testified that both categories of students frequent the park. (J.A. 106).

student population, some of those students do not use drugs, but some of those students do.[4]

The implementation of the Policy in 1998 was not a rush to judgment by the Board nor was it implemented solely as a response to several vocal parents concerned about drug abuse in order to signal a "tough on drugs" attitude, as Respondents contend. (Brief, 3).[5] The primary purpose for the implementation of the Policy was to address the long-standing drug problem in Tecumseh by utilizing this tool in an effort to eliminate student drug use by the students who do use them; to obtain counseling and treatment for drug users; and to deter those students who might be inclined to use drugs due to peer pressure.

The Tecumseh Board began to discuss the implementation of a drug-testing policy during the 1994-1995 school year and continued to discuss it thereafter on a yearly basis. (J.A. 84). The Policy was not implemented during that earlier period of time "because some of the school board members didn't think we (Tecumseh) had that much of a problem. But if you speak to them today they will tell yes (*sic*), we do." (J.A. 85).

In Spring 1998, the community became more aware of the problem. (J.A. 85). Parents and grandparents called Tecumseh Board members and stopped them in the com-

[4] Respondents miss the point when they take issue with the Solicitor General's fact that two of the four students who tested positive were engaged in FFA, stating that these students would have been drug tested anyway because they were also engaging in Athletics. (Brief 2, note 2). The significant point of this fact is that students engaged in FFA competition engage in substance abuse.

[5] *Amici* The Rutherford Institute quotes the testimony of Tecumseh Board President wherein she expresses her opinion that students engaged in competition represent Tecumseh. They therefore conclude the "primary purpose" of the Policy is to "safeguard the reputation of the school district." (Brief *Amicus Curiae* of The Rutherford Institute, 9). The totality of the record simply does not support this conclusion.

munity to lodge their concerns to these elected officials. (*Id.*) The Tecumseh Board President provided some detail about one of those conversations that occurred at the local supermarket:

> A. One of them was a clerk. Her daughter had skipped school and gone to her boyfriend's. And she made the statement that she knew they were smoking pot and she was very upset that her daughter had skipped school and that something needed to be done.
>
> Q. Okay.
>
> A. That's one in particular because the daughter came in about 15 minutes later and was very belligerent, just flung herself in front of some people between me and the people that were waiting, and very unrespectful to her mother. Wanting to know who she was talking to and why was she talking about her and things like that, and I just turned around and told her she's talking to me. (J.A. 88).

Certainly, the Tecumseh Board did not specifically know the details of Daniel's knowledge of drug abuse when it adopted the Policy at issue here. Daniel did not attend the public hearing conducted by the Tecumseh Board to discuss the Policy.[6] But Daniel's testimony compellingly demonstrates the

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[6] The Tecumseh, non-district and home schooling parents who have joined Respondents as *Amici Curiae* claim they did not know about the meeting (Brief of Jean Burkett, *et al.*, 2), although prior notice was publicly posted by Tecumseh as required by law, and the local newspaper reported the pending August 31, 1998 special meeting on August 20, 1998 ("School Board Will Discuss Drug Testing" *available at* http://www.tecumsehok.com/CountyWide/980820d.htm), and August 27, 1998 ("School Board to Consider Drug Testing" *available at* http://www.tecumsehok.com/CountyWide/980827d.htm). The local newspaper also reported the results of the public meeting shortly thereafter ("Parents Want Student Drug Testing Now. . ." *available at* http://www.tecumsehok.com/CountyWide/980903b.htm).

conditions that made the Tecumseh community aware, through reason and common sense, that drug abuse exists in Tecumseh. To call such drug abuse "negligible," as the court of appeals and Respondents do. fosters the misguided notion that school districts must condone a fixed minimum of drug abuse which is known by officials, parents and students before such abuse reaches some undefined level that enables them to take additional steps to alleviate it.

While the quantum of drug use by students at Tecumseh acknowledged by Daniel, standing alone, may not give rise to a drug concern important enough to members of a board of education in another school district to implement a suspicionless drug testing program, the Tecumseh Board, who are all parents or grandparents of Tecumseh students and are acutely and intimately aware of the conditions within the school district, determined that the drug abuse that existed in the District was more severe than it should be. The Tecumseh Board determined that suspicionless drug testing should be employed in an attempt to eradicate the problem and obtain counseling and help for the students who were abusing drugs.

Respondents also inform the Court that these students, *i.e.*, those who do not engage in school athletics, are not role models to other students, and other students would not strive to emulate their behavior. They contend that drug testing of the non-athletes does not deter any other student from drug abuse (Brief, 11, 15, 44-45). This contention defies the common and everyday understanding of all people that students gravitate toward distinct groups and cliques in school. While a FFA student in rural Oklahoma may not associate with athletes, it cannot be questioned that a FFA student is likely to engage in social activities with other FFA students, both inside and outside of school. Students will tend to emulate and model the behavior of students with whom they feel kinship and share common experiences. It is axiomatic that "[t]he law of imitation operates, and

nonconformity is not an outstanding characteristic of children." *Illinois ex rel. McCollum Board of Ed. of School Dist. No. 71*, 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring). Further, "adolescents are often susceptible to pressure from their peers towards conformity, and that influence is strongest in matters of social convention." *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

Respondents additionally infer that the implementation of the Policy at Tecumseh strangles the "free mind at its source," teaches its students "to discount important principles of our government as mere platitudes" and transforms Tecumseh into an institution "of coercion and captivity." (Brief, 16).

Ironically, while Daniel objected to the use of canine interdiction programs, surveillance cameras, and car searches (C.A. App. 208-210), as well as the suspicionless drug testing program by Tecumseh as invasions of his privacy, he voluntarily agreed upon graduation to be subjected to suspicionless drug testing by the government by his enlistment in the United States Air Force. Likewise, if other Tecumseh alumni aspire after graduation to choose certain occupations such as nuclear power plant employees,[7] army civilian employees,[8] railroad employees,[9] airline employees,[10] prison employees,[11] Department of Justice employees,[12] customs agents,[13] firefighters or emergency medical

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[7] *Rushton v. Nebraska Public Power District*, 844 F.2d 562, 566 (8th Cir. 1988)

[8] *National Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603 (D.C. Cir. 1989)

[9] *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602 (1989)

[10] *Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1990)

[11] *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989)

[12] *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989)

[13] *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989)

technicians,[14] police officers,[15] commercial truck drivers,[16] school bus drivers,[17] or employment in virtually all Fortune 500 companies,[18] they too will be subject to suspicionless urinalysis testing. Even during high school life, as experienced by Daniel in the City of Tecumseh, a student is required to consent to suspicionless drug testing when applying for a part time job with McDonald's or K-Mart. (C.A. App. 217). The conditions created by the Policy are no different from those to which Tecumseh students will be required to adapt in our society as it now exists.

The question presented to this Court by Respondents in their Brief in Opposition to the Petition for Certiorari erroneously suggests that the Tecumseh teachers, administrators and Board President acknowledge a complete absence of drug use among students in Competitive Activities.[19] The record simply does not support their question as presented. The choir coach suspected members of the choir to be on drugs (J.A. 125); and when asked about drug use overall among her choir students, she stated "[A]nd you're going to find that a lot of those students don't take drugs, but some do. They may be intelligent but not smart." (J.A. 128). The FFA coach as well believed students in FFA were abusing drugs

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[14] *Saanedra v. Albuquerque*, 73 F.3d 1525 (10th Cir. 1996)

[15] *Ford v. Down*, 931 F.2d 1286 (8th Cir. 1991)

[16] Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C.A. § 31301, *et seq.*

[17] Id.

[18] "American Civil Liberties Freedom Network—Drug Testing of Workers Keeps Rising," January 12, 1998, *available at* http://www.aclu.org/news/w011298b.html.

[19] "Whether the court of appeals correctly held that the Fourth Amendment protects students . . . where teachers, school administrators, and the board president agree that no documented drug problems exists among the targeted group . . . ." [Brief in Opposition, (i)]

and has overhead those students discussing drug use though he believes these students may be less likely than the general population to engage in substance abuse. (J.A. 119-121). Indeed, two of the four students who tested positive in the 1998-99 and 1999-00 school year were students engaged in FFA competition. Moreover, the Tecumseh Board President clearly acknowledges drug use by students in extracurricular activities, although she too believes there may be a greater drug problem in the overall student population.[20] On the other hand, the High School Principal believes that students in extracurricular activities are no different than the general student population with regard to drug abuse. (J.A. 106).

ARGUMENT

1. Proof of an Extraordinary Drug Problem is Not Required in Order to Establish Tecumseh's Status as a Special Needs Environment.

Respondents interpret *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) ("*Vernonia*") as approving "a generalized search of students only upon showing *a number of demonstrated and specific circumstances* establishing a governmental interest reaching beyond the school's *everyday* needs." (Brief, 10) (Emphasis ours). They contend that *Vernonia* demonstrates "that such searches are permitted upon a showing of need beyond the *ordinary* needs of school administration." (Brief, 13) (Emphasis ours). Respondents argue that since Tecumseh has not established an interest beyond the school's *everyday* needs, or a need beyond the *ordinary* needs of school administration, Tecumseh's Policy is unconstitutional.

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[20] "We have students that are on drugs, use alcohol, and they are in extra-curricular activities. There are probably more that are not in activities." (J.A. 101).

The evidence in *Vernonia* which provides the basis for this Court's approval of a suspicionless drug program for the targeted group of athletes was of the same quantum and character of evidence presented here. Students in general began to speak out about their attraction to drug use and began boasting about it and disciplinary referrals in general increased. Several students were suspended for drinking alcohol. A wrestler suffered an injury, which the wrestling/ football coach believed was caused by drug use and the coach observed omissions of safety procedures which he believed may have been caused by drug use. Small groups of students not identified as athletes were observed by a teacher passing marijuana back and forth off school property, and a group of athletes was arrested for consuming alcohol and drugs at a student's house. Some students admitted drug use to school officials, and one student was sent home who appeared to be inebriated.

The overwhelming majority of the evidence of drug use in *Vernonia* necessarily involved observations and opinions of teachers and administrators based on inferences drawn from the behavior and conduct of its students in general. In small school districts such as Vernonia and Tecumseh, school officials know their students. They know them on a first-name basis, know their family life, and know how they normally behave.

The critical flaw in Respondents' interpretation of *Vernonia* is that the facts regarding overall drug use in *Vernonia* were sufficiently demonstrated and specific to establish an interest of school officials beyond the school's *everyday* needs necessary to implement a suspicionless drug testing program for its athletes. The same finding should result in this case.

If Tecumseh's previously detailed record of its drug problem is not the type of demonstrated and specific circumstances Respondents contend are required, Tecumseh school officials would have to ignore as simply everyday and

ordinary occurrences in school life the students in FFA, FHA and Choir classes who appear to their teachers to be under the influence, reports by the choir students to their teacher that others in choir are doing drugs, conversations by students overheard by the FHA and FFA teachers in which drug use is openly discussed, counselors listening to students admit their present and past drug use, the principal's sense of the smell of marijuana on students, the confiscation of prescription drugs being sold by eighth grade boys, marijuana found in a student's car, in the middle school locker room and in the parking lot, and students being placed in drug rehabilitation facilities.

Respondents' position that a certain amount of drug use should be now acceptable as an activity normally engaged in by students undermines our national mission to stop drug abuse among our children. More important, such a heightened standard would require Tecumseh to tell parents, teachers and students that the presence of such abuse in Tecumseh is part of usual everyday school life that must be tolerated.

Respondents contend that Tecumseh must prove a special need beyond the special need that already exists in a school setting in order to demonstrate that its Policy is constitutional.[21] This additional special need presumably is proof of a drug problem beyond the *everyday* drug problem schools may endure. Respondents argue therefore that Tecumseh must prove an "extraordinary" drug problem as a threshold issue before proceeding to the *Vernonia* balancing test.

This Court has never required proof of a double special need to demonstrate the constitutionality of a search. Unlike

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[21] "To survive constitutional scrutiny, therefore, the School's Policy must be designed to serve a special need, beyond the normal need for school discipline that prompted the Court in *T.L.O.* to find the warrant and probable cause requirements inapplicable in schools." (Brief, 17).

the environments reviewed by this Court in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) or *Chandler v. Miller*, 520 U.S. 305 (1997), a special need for relaxation of the Fourth Amendment in order to maintain discipline and order among our schoolchildren already exists in Tecumseh due to its very nature as a school district. *New Jersey v. TLO*, 469 U.S. 325 (1985); *Vernonia, supra*. Moreover, the drug testing regime here has absolutely no law enforcement involvement. If a student tests positive, law enforcement is not contacted. The parents of the student are contacted and the student is required to obtain counseling and demonstrate no further drug abuse. If the student refuses to obtain counseling or engages in further drug abuse, the student is merely unable to compete. Law enforcement is not involved in any manner.[22]

While it is true this Court prefaced the *Vernonia* opinion with the details of the drug problem that existed in that school district, such details served both as a statement of the case and as a precursor to this Court's factual review of the immediacy of the school's concern. The drug use in that district did not cause this Court to find another special need to justify a departure from the requirements of the Fourth Amendment, and the level of drug use in Tecumseh should not be the basis to determine an additional special need.

For an individualized search, the special needs of the school setting dispense with the warrant and probable cause requirements. The test for reasonableness is whether the search is justified at its inception based upon reason and common sense and whether the search is reasonably related in scope to the circumstances which justified the invasion. *T.L.O.*, supra, 469 U.S. at 341.

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[22] Of course, any student found to be in possession of illegal drugs at school is disciplined and law enforcement is called because of the student's violation of law. This is distinct from the Policy at issue here.

For a suspicionless search, the special needs of the school setting do not change. The test for reasonableness does. Tecumseh's Policy should be judged for reasonableness by balancing (1) the nature of the privacy interests of the students engaged in Competitive Activities and the nature and character of the intrusion against (2) the nature and immediacy of Tecumseh's concern based upon reason and common sense and the efficacy of Tecumseh's program to address the concern.[23] *Vernonia*, supra, 515 U.S. at 654, 658, 660. Since Tecumseh represents an environment of special needs, the *Vernonia* balancing test must be applied.

2. Tecumseh Students Engaged in Competitive Activities Have a Diminished Expectation of Privacy.

To determine the nature of the privacy interest of students engaged in Competitive Activities, the first factor to consider is that students, generally, have a diminished expectation of privacy than other citizens. On this point, Respondents agree. (Brief, 18). Tecumseh's Brief of Petitioners outlines the factors which demonstrate that students who voluntarily engage in Competitive Activities have a more diminished privacy interest than students generally.[24]

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[23] *Amici Curiae* The Rutherford Institute ignores the *Vernonia* balancing test. Like Respondents, it mistakenly urges this Court that "special needs" different from those recognized in *TLO* and *Vernonia* must be demonstrated by a school district before it is permitted to have flexibility under the Fourth Amendment when suspicionless drug testing is at issue. (Brief *Amici Curiae* of The Rutherford Institute, pgs 8, 9).

[24] Respondents contend Tecumseh has "admitted" the OSSAA rule regulating out-of-school behavior has never been utilized in the State of Oklahoma. (Brief, 20). To the contrary, Tecumseh objected to the Interrogatory as broad and overreaching and could only answer that it was not aware of the rule's state-wide enforcement. Tecumseh does not maintain and therefore had no knowledge of state-wide records. (J.A. 46)

Contrary to Respondents' assertions (Brief, 20, 21), the voluntary nature of Competitive Activities is an additional and important factor to consider in weighing the nature of the student's privacy interest in *Vernonia*, finding that when students choose to engage in such activities, they "voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally." *Vernonia*, *supra*, 515 U.S. at 657.[25]

Moreover, Respondents and *Amici* mistakenly view participation in Competitive Activities as a "choice" each student makes similar to the choice to participate in graduation, citing *Lee v. Weisman*, 505 U.S. 577, 595 (1992). (Brief, 21). In truth, a student who desires to engage in Competitive Activities may initially make a choice to try out or audition for the athletic, cheerleading, pom pom, band, vocal, FFA, FHA and academic teams; however Oklahoma, like other states, requires that "state and national contests are those for which a student **must earn the right to compete**." (C.A. App. 71) (Emphasis ours).

Tecumseh's Policy does not bar students from engaging in extracurricular activities if they decline to consent to suspicionless drug testing or if they choose to maintain a lifestyle of substance abuse. These students may choose a wide variety of other extracurricular activities offered by Tecumseh, or they may practice and be instructed in the classroom associated with the Competitive Activities. The Policy only limits those students from competing against other students.[26]

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[25] Justice Ginsberg, concurring, noted that only students "seeking to engage with others in team sports" rather than students "required to attend schools" were at issue. *Vernonia, supra,* 515 U.S. at 666.

[26] Some individuals in the City of Tecumseh and surrounding towns now apparently object to Tecumseh's Policy because it is their responsibility to ensure that their children are "safe or well-behaved when

3. The Character of the Intrusion Implicated by Tecumseh's Policy is Negligible.

Respondents portray public restrooms as places where people "do not generally converse or even make eye contact," and where a sense of privacy is created by not speaking to others, expecting that "others will not engage with them." (Brief, 22, 23).

Clearly, the average school restroom cannot be characterized in such a fashion. These restrooms are collectively used by students within a span of five minutes between classes. Lindsay did not use school bathrooms very often, but when she did, other students and teachers were using the facilities at the same time out of necessity. (C.A. App. 194). School bathrooms during the periods between classes neither are quiet nor are they private places. Moreover, Lindsay found the procedure of producing urine in a hospital equally as offensive as producing her urine at school. (C.A. App. 195).

As found in *Vernonia* and both the district court and court of appeals here, the intrusion of privacy by providing urine in a school restroom is negligible.[27]

With regard to the other aspects of privacy, the one coach who erroneously looked at a student's prescription list (Brief,

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they are outside the school's custodial control." (Brief of Jean Burkett *et al.*, 11). The premise of Tecumseh's Policy is to ensure their children's safety when they are within the school's custodial control, but outside of the numerous safety valves contained in the traditional school setting that offers students, as well as their parents, protection.

[27] New technologies will no doubt become available to detect drug use by students. Currently, detection of drug use by analyzing hair samples is a measure that is employed. However, such methodology is in its early stages. (See, *i.e.*, "Drug Tests at Work Can Be Hair Raising," *available at* http://www.sunone.com/news/articles/02-08-00e.shtml). No doubt such sampling would be a "search" and Respondents would likewise find such procedure invasive.

24) is the same coach that for health and safety reasons has required the same information from her students when she travels with them overnight to competitions long before the Policy was ever implemented. (Pet. for Cert., App. D, 75a).[28] The Policy is designed to minimize the privacy intrusiveness of the procedure (J.A. 198) among those student who already have a more diminished privacy interest than the general student population.

4. The Nature and Immediacy of Tecumseh's Concern is Important Enough to Justify the Search at Issue.

Respondents have transformed Tecumseh's prong of the balancing test from a showing of the nature and immediacy of its concern to a demonstration that its concern "comes in response to a real and immediate problem." (Brief, 25).

Respondents have ignored the basic premise in *Vernonia* that Tecumseh is required to show "an interest which appears *important enough* to justify the particular search at hand" in light of the fact that the search is relatively unintrusive and the expectation of privacy of students in Competitive Activities is diminished. *Vernonia*, supra, 515 U.S. at 661.

In *Vernonia*, this Court found the deterrence of drug use among students to be important enough to meet the requirement for the nature of a school's concern. With regard to the specific group of athletes, the nature of the concern was heightened because the risk of physical harm to the drug users, their teammates or the other students on the opposing

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[28] By school policy in many schools throughout the country, students are prohibited from possessing prescription or non-prescription medication while at school. If a student requires medication during the school day, school districts routinely require that all medication must be administered by school officials. Therefore, certain school officials are typically aware of student health and medication information.

team is particularly high. As explained in their brief, Tecumseh's concern likewise goes beyond deterrence.

The Policy is implemented not only as a preventive measure, but to combat an ongoing drug problem in Tecumseh.[29] Tecumseh has never taken the position that students engaged in Competitive Activities are the only students or even the most likely students to abuse drugs.[30] Tecumseh, after proper deliberation and consideration,

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[29] Respondents fault Tecumseh for failing to test for alcohol, tobacco, or ecstacy. (Brief, 45). As shown by the record, ethanol (alcohol) and nicotine are detectable for short periods of time (J.A. 70, 71), and methylenedioxymethamphetamine, more commonly known as "ecstasy" (*See*, "MDMA, ONDCP Drug Policy Information Clearinghouse, Fact Sheet, July 2000," *available at* http://www.whitehouse-drugpolicy.gov/publications/pdf/ncj181141.pdf) contains concentrations of amphetamines which can be detected through the testing process.

[30] On this issue, Respondents and their *Amici* have numerous responses for why Tecumseh's position should fail. As examples, *Amici* American Academy of Pediatrics suggests that "young people who are already well protected from substance abuse are the same ones who are more likely to join in school activities." (Brief of *Amici Curiae* American Academy of Pediatrics, *et al.*, 11); *Amici* National Association of Criminal Defense Lawyers contends that "[i]f students in virtually any extracurricular activity may be drug tested, the school effectively only drug tests the college bound . . ." (Brief *Amicus Curiae* of National Association of Criminal Defense Lawyers, *et al.*, 18) and; *Amici* Professor Akhil Reed Amar surmise that "[W]e are aware of no reason to believe that high school students subject to this policy are more likely to use drugs than college students a few years older." (Brief *Amici Curiae* of Profession Akhil Reed Amar, *et al.*, 10). In sharp contrast, however, the American Civil Liberties Union issued a position paper in September, 1999 which states: [s]tudies of college students consistently show no difference between marijuana users and non-users in grade-point averages, career aspirations, or participation in extra-curricular activities." (C.A. App. 1006-1008). This dispute among collectors of statistical data as to whether students engaged in extracurricular activities are more likely, less likely or equally likely to engage in illicit substance use adds nothing to the real fact that kids engaged in Competitive Activities do drugs.

determined that only those students who participate in Competitive Activities, who are not insulated from drug abuse,[31] who voluntarily subject themselves to higher in-school and out-of-school standards and regulations, and who command from officials a greater degree of concern due to injury and/or limited supervision should be covered by the Policy.[32] This was a reasonable and considered exercise of Tecumseh's judgment. The action of the Tecumseh Board in adoption of the Policy, after inviting public comment and scrutiny, is not arbitrary and capricious, nor is it unfounded.

As to the immediacy of the concern, Respondents and the court of appeals have mistakenly placed this factor as the primary and exclusive factor to determine whether

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[31] Respondents view the testimony of the Tecumseh Board President that she selected the interscholastic activities of athletics, FFA and band because they were her "pet" organizations as proof that Tecumseh's primary concern was not drug-related, but merely symbolic in nature. (Brief, 3). Ms. Rogers is not only a board member, but was active as a parent in the Band Booster Club, FFA Booster Club and Athletic Booster Club (J.A. 90), and much of her knowledge of drug use was obtained through these activities.

[32] To support their argument that Tecumseh's concern due to the limited supervision of students is not legitimate, Respondents note that the Math Club, which has not been in existence for a number of years, once went on a trip to a Colorado ski resort. (Brief, 30). Petitioners admitted the trip was a "club" sponsored trip, not a district-sponsored trip where the coach is paid to supervise the students and the district is liable to the parents for their safety. This is the same type of trip, similar to the student trips to Six Flags, that is not district-sponsored and where students themselves pay for the excursion. (C.A. App. 560, 562). Moreover, *Amici* American Academy of Pediatrics agrees that the risk of harm to students is greater when little or no supervision is provided them. (Brief of *Amici Curiae* American Academy of Pediatrics, *et al.*, 12, 13). As Tecumseh stated in the lower court, whether these students are left to their own devices at home with minimal parental supervision or in school activities with minimal school supervision is a distinction in which the District finds little comfort.

Tecumseh's Policy is constitutional. Moreover, "immediacy" of the concern appears to be defined by Respondents as a concern that has reached a "crisis stage."

Tecumseh's concern is immediate because a drug problem exists in its schools and has existed for a long time despite the numerous measures it has implemented to deter and eliminate the problem. Students who wish to engage in Competitive Activities also engage in substance abuse. The immediacy of the concern to Tecumseh is heightened because the students engaged in Competitive Activities who engage in substance abuse are in the custody and care of school officials during untraditional times when there is minimal supervision and the already implemented measures cannot be utilized. Immediacy should not be defined to require Tecumseh to wait until drug abuse gains a strangle hold on these students before it may take steps to eliminate the abuse through suspicionless drug testing. As so eloquently stated by Judge Ebel:

> "To the extent that it is possible to prevent the irreparable harm attendant to illegal drug use through the diligent efforts of officials in our public schools, we should allow them to try."

(Pet. for Cert., App. A, p. 39a).

Respondents point to and detail the applications submitted by Tecumseh to apply for federal funds under the Safe and Drug Free Schools and Communities Program as documented proof that Tecumseh does not have a drug problem. (Brief 1, 35, 36, 37, 39). Those applications show that alcohol has been the major problem at Tecumseh since the 1988-89 school year (the applications for funding are submitted in the previous year for funding in the ensuing year). (J.A. 163,168). Alcohol remained the number one substance abuse problem until the 1995-96 school year when tobacco was identified as an additional major problem. (J.A. 186). With regard to the use of controlled dangerous substances, there were indications by the previous school administration that they believed drug

use was "going down" in the 1989-90 and 1991-92 school years (J.A. 168, 171); however, there is no indication that drug use continued to decrease after the 1991-92 school year. The applications all consistently demonstrate that drug use is present in Tecumseh, although not as rampant as alcohol or tobacco.

The nature and immediacy of Tecumseh's concern could well have included suspicionless drug testing for alcohol and tobacco; however, due to the limited time span after use for effective detection (J.A. 71) it would probably prove to be a futile endeavor.

5. *Vernonia* Remains as the Controlling Authority to Determine the Constitutionality of Tecumseh's Policy.

The overall theme emerging from the Brief of Respondents and many of their *Amici* is that the *Vernonia* decision is merely an aberration which should be limited to its specific facts. They argue that, if Tecumseh's Policy were limited to student athletes who were known to be the ringleaders of a rebellious drug culture, the *Vernonia* decision would apply.[33] Since Tecumseh's Policy covers students engaged in all interscholastic competitions and who have not been identified as rebellious drug kingpins by Tecumseh, Respondents and *Amici* argue *Vernonia* does not apply.

If the *Vernonia* decision was intended only to be used when student athletes become the leaders of the drug culture, the ruling contained in the decision surely would have stated just that—drug-ravished athletes can be randomly drug tested. Rather, this Court employed the test it had earlier adopted to

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[33] Brief, 6; Brief of Juvenile Law Center, *et al.*, 8; Brief of Jean Burkett, *et al.*, 1; Brief *Amici Curiae* of The Rutherford Institute, 19; Brief *Amicus Curiae* of National Association of Criminal Defense Lawyers, *et al.*, 3.

determine the constitutionality of suspicionless drug testing by state actors. If the environment in question presents a special need, suspicionless drug testing will be constitutional if the governmental concern and need outweigh the privacy interests of the individuals involved.[34]

Finding the school environment to be an already established special needs environment,[35] the balancing of individual privacy and government interests was necessarily employed in *Vernonia*. Tecumseh believes the utilization of this Court's enunciated balancing test demonstrates that Tecumseh's determination to implement a suspicionless drug testing program is a constitutional exercise of its judgment as guardians and custodians of its students.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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[34] "Taking into account all the factors we have considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude Vernonia's Policy is reasonable and hence constitutional." *Vernonia*, 515 U.S. at 665, 666.

[35] Interestingly, *Amici* Professors Akil Amar and Vikram Amar appear to be expressing the contrary and flawed argument that because the majority of these students are non-voting minors and are "structurally disabled" from protecting their interest, the ability of a school board to prescribe their conduct should be more curtailed than the government's ability to prescribe the conduct of adult citizens. (Brief *Amici Curiae* of Professor Akhil Reed Amar, *et al.*, 9).

Respectfully submitted,

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Court, U.S.
FILED
DEC 26 2001
OFFICE OF THE CLERK

No. 01-332

In the Supreme Court of the United States

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY, ET AL., PETITIONERS

v.

LINDSAY EARLS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Fourth Amendment prevents a public school district from requiring students who choose to participate in non-athletic interscholastic competitions to agree to random urinalysis testing for illegal drug use.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	8
Argument:	
The Fourth Amendment does not prohibit the school district's random drug-testing policy	11
A. As in *Vernonia*, the privacy interests of students subject to testing are greatly diminished by the school setting and activities in which they have chosen to participate	12
B. The "intrusion complained of" in this case is, if anything, less significant than in *Vernonia*	15
C. The court of appeals erred in concluding that the government concern in this case is of a different constitutional dimension than the one in *Vernonia*	17
1. The policy's application to non-athletes does not render the government concern any less significant	17
2. The school district was not required to allow drug use at Tecumseh to worsen before adopting its policy	20
D. Under a proper balancing, the school district's drug-testing policy is reasonable and thus constitutional	25
Conclusion	26

TABLE OF AUTHORITIES

Cases:	Page
Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. *Pico*, 457 U.S. 853 (1982)	24
Chandler v. *Miller*, 520 U.S. 305 (1997)	10, 12, 22
Griffin v. *Wisconsin*, 483 U.S. 868 (1987)	11
National Treasury Employees Union v. *Von Raab*, 489 U.S. 656 (1989)	11, 12, 21, 24, 25
New Jersey v. *T.L.O.*, 469 U.S. 325 (1985)	13
Skinner v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989)	11, 12, 21, 24
United States v. *Edwards*, 498 F.2d 496 (2d Cir. 1974)	15
Vernonia Sch. Dist. 47J v. *Acton*, 515 U.S. 646 (1995)	*passim*
Constitution and statutes:	
U.S. Const. Amend. IV	7, 11, 12, 13, 15
The Safe and Drug-Free Schools and Communities Act of 1994, 20 U.S.C. 7101 *et seq.*	1
20 U.S.C. 7102(2)	17
20 U.S.C. 7116(b)(2)(C)	1
Miscellaneous:	
Centers for Disease Control, *Youth Risk Behavior Surveillance—United States, 1999*, 49 Morality Weekly Report 14 (June 9, 2000)	2
Office of Nat'l Drug Control Policy, *Nat'l Drug Control Strategy: 2001 Annual Report* (Jan. 2001)	2-3
Office of Applies Studies, Substance Abuse & Mental Health Servs. Admin., *Nat'l Household Survey on Drug Abuse Report* (Nov. 9, 2001)	3, 22
Public Health Service, Nat'l Institutes of Health, *Monitoring Future: Nat'l Results on Adolescent Drug Use* (2000)	2

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INTEREST OF THE UNITED STATES

Drug use among the Nation's school children poses a grave threat not only to the lives of individual students and their families, but to the health of the Nation itself. The Safe and Drug-Free Schools and Communities Act of 1994, 20 U.S.C. 7101 *et seq.*, authorizes federal grants to local educational agencies for drug and violence prevention programs, including programs like the one at issue here, designed "to combat illegal alcohol, tobacco and drug use." 20 U.S.C. 7116(b)(2)(C).[1] The United States, primarily through the

[1] In fiscal years 1996 through 2001, Congress appropriated between $340 and $415 million annually for local drug and violence prevention

Department of Justice and Department of Health and Human Services, administers numerous other programs that seek to deter illegal drug use, particularly among youth. The United States participated as an amicus in *Vernonia School District 47J* v. *Acton*, 515 U.S. 646 (1995), which involved a challenge to a school district's random drug-testing policy for student athletes.

STATEMENT

1. Illegal drug use remains prevalent among the Nation's school children. In a survey conducted last year, 54% of 12th grade students and 45.6% of 10th grade students from 435 schools across America reported they had used an illegal drug during their lifetime. Public Health Service, Nat'l Institutes of Health, *Monitoring the Future: Nat'l Results on Adolescent Drug Use* Table 1 (2000). In the same survey, 24.9% of 12th grade students and 22.5% of 10th grade students said that they had used an illicit drug at least once in the past month. *Id.* Table 2; see Centers for Disease Control, *Youth Risk Behavior Surveillance—United States, 1999*, 49 Morbidity and Mortality Weekly Report 14 (June 9, 2000) (*Youth Risk Behavior*) (In 1999, 47.2% of high school students nationwide reported that they had used marijuana, and 26.7% of such students did so one or more times during the prior 30 days); Pet. App. 28a-29a n.2.[2]

At the same time, school children not only are more vulnerable to drug use than adults, but such abuse is much more likely to devastate their lives. Office of Nat'l Drug

efforts. Under the Act, the school district in this case received annual grants for such efforts in the past four years totaling approximately $40,000.

[2] In the 1999 survey, 7.2% of students said that they had used marijuana on school property in the previous month. More than 30% of students reported that they had been offered or sold illegal drugs on school property in the prior year. *Youth Risk Behavior* at 18.

Control Policy, *Nat'l Drug Control Strategy: 2001 Annual Report* 10. Children who abuse drugs risk serious physical and psychological harm, as well as death. *Ibid.* They are less likely to achieve success in the classroom, and more apt to engage in criminal and other high-risk behavior, including driving while impaired and engaging in sexual acts that may result in unintended pregnancies or the transmission of disease. *Id.* at 10, 13. Drug use also has contributed to the rise in youth violence. Office of Applied Studies, Substance Abuse & Mental Health Services Admin., *Nat'l Household Survey on Drug Abuse Report* 2 (Nov. 9, 2001).

2. a. Tecumseh, Oklahoma, is a rural community about 40 miles southeast of Oklahoma City. Petitioners (collectively, the "school district") are a public school district in Tecumseh and its governing board of education. The school district administers Tecumseh High School, which has about 750 students in grades 9 through 12, as well as a middle school and elementary schools. Tecumseh High is a member of the Oklahoma Schools Secondary Activities Association (OSSAA), which sponsors and regulates competitions among public school students from across the State. Most Tecumseh students participate in extracurricular activities governed by the OSSAA, including not only sports but also cheerleading, band, choir, color guard, Pom Pom, Future Homemakers of America (FHA), Future Farmers of America (FFA), and the academic team. Pet. App. 2a-3a.

b. Like virtually every community in America, Tecumseh has experienced illicit drug use among its school children. The record in this case provides direct testimonial and other evidence of such abuse. For example, a school board president testified that marijuana use has been reported in the classroom at Tecumseh High. J.A. 96. Three teachers testified that they heard students talking about marijuana use, J.A. 115-116, 120-121; that they suspected that several students in their classes were abusing drugs, J.A. 119, 120,

125; and that they had reported students for drug use, J.A. 120, 127. Pet. App. 57a-58a & nn. 12-13.

Students too—including respondents themselves—have acknowledged drug use in Tecumseh schools. Lindsay Earls stated during a nationally televised program that there is "a widespread drug problem" at Tecumseh High. Pet. App. 58a n.14. Daniel James testified that he has seen "about twelve" students under the influence of illegal drugs, is aware of others who have abused such drugs, and knows of students who have entered drug rehabilitation programs. J.A. 122-124. In addition, school counselors met with students to discuss drug use more than 40 times between 1997 and 2000, J.A. 52-56, and drug dogs "hit" on students or their vehicles several times between 1997 and 1999. C.A. App. 633-636, 640-642, 644-646, 649-650; see J.A. 58-59.

Those reports of drug use include incidents involving students who participate in competitive activities governed by the OSSAA. For example, a voice teacher testified that she has had students tell her about drug use among students in the choir, and has observed choir students who appeared to be impaired. J.A. 125-126. An FHA supervisor testified that students talk freely in class about marijuana use. J.A. 115. School counselors have reported several instances of drug use among band members, and other incidents of drug use among students in vocal. J.A. 52-56. An FFA supervisor testified that he has suspected drug use among members of FFA, and has overheard students discuss drug use. C.A. App. 204-205. In addition, students enrolled in sports, FFA, band, and vocal have been caught with or disciplined for drugs. J.A. 44; see also J.A. 78, 81, 99, 101, 105.

c. The community has tried to deter drug use in a number of different ways. For example, the school district has observed "Red Ribbon Week" each year, during which anti-drug rallies are held and students are urged to pledge to remain drug-free. The school district participates in a "Grim Reaper" program designed to inform students about the perils of drug use. The school district has stepped up surveillance activities, and uses drug dogs to sweep school property. Pet. App. 59a n.20. In addition, since at least 1995, the school district has considered implementing a student drug-testing policy, as an added deterrent. C.A. App. 123.

In 1998, discussions over whether to enact such a policy intensified as "people all over the community" began to become more "aware" of a drug problem at Tecumseh High. Pet. App. 58a; C.A. App. 123-125; J.A. 85. After a February 1998 school board meeting at which a parent admitted her own child's drug use, J.A. 86, marijuana was found hidden in the school parking lot and in a student's car, J.A. 101-103, 140. In August 1998, after receiving more calls for action, the school district convened a special community meeting at which a proposed drug-testing policy was discussed. J.A. 137-139. No one who attended that meeting was reported to have objected to suspicionless drug-testing of school children. C.A. App. 78. Shortly thereafter, the school district adopted the drug-testing policy at issue in this case.

d. The policy applies to all students who participate in interscholastic competitions governed by the OSSAA, including both athletic and non-athletic activities. J.A. 193. Before a student is allowed to enroll in such an activity, he must return a consent form signed by him, his parent, and his coach, agreeing to be bound by the policy. J.A. 203-204. The policy authorizes three forms of urinalysis testing for illegal drugs. First, all students are tested as part of the annual physical examination required for a sport or, for non-athletes, before participation in OSSAA competitions. Second, random tests are conducted each month based on names drawn from the pool of all students covered by the policy. Third, any covered student who is suspected of drug use may be tested at any time. J.A. 196-197.

During tests, students are accompanied into a restroom by an adult monitor of the same sex and asked to provide a urine sample from behind a "closed stall." J.A. 198. Monitors examine the specimen for temperature and tampering, and give students a form on which the student may list any medications being taken. School district employees "shall not" view that list. J.A. 199. The specimen and medication list are sent to an independent laboratory, which tests for amphetamines, cannaboid metabolites, cocaine, opiates, barbituates, and benzodiazepines. An initial "positive" may be reported only if it is confirmed by a second test using the gas chromatography/mass spectrometry technique. *Ibid.*

Positive test results are disclosed only to the parent, student, principal, and coach, and not to law enforcement. A first offense results in drug counseling and another drug test in two weeks, but the student may continue to participate in OSSAA-governed activities. Students who test positive a second time are suspended from OSSAA activities for two weeks, and must agree to drug counseling and random drug tests for the rest of the year. A third strike, or any refusal to submit to a drug test, bars the student from OSSAA activities for the remainder of the school year. J.A. 201-202. Students may appeal test results to the superintendent and continue to participate in OSSAA activities. J.A. 200. No suspensions from school or academic sanctions may be imposed for violating the policy. J.A. 193.[3]

3. In 1999, respondents, Tecumseh High students who desire to participate in non-athletic interscholastic competitions governed by the school district's policy, brought this

[3] The policy has been implemented in three years. During the 2000-2001 school year, for example, 642 initial tests were given. Eleven students tested positive, four of whom were involved in non-athletic activities. During that same year, 205 random tests were conducted and six students tested positive, one of whom was involved in a non-athletic activity. C.A. Pet. Reh'g 5 n.3.

Section 1983 action seeking declaratory and injunctive relief from enforcement of the policy on the ground that it violates the Fourth Amendment.[4] On cross-motions for summary judgment, the district court granted summary judgment for the school district. Pet. App. 50a-81a. Following the same "special needs" analysis applied in *Vernonia School District 47J* v. *Acton*, *supra*, the court held that the school district has shown a "legitimate cause for concern" (Pet. App. 61a) to justify its policy, and that the school district's need outweighs the diminished expectations of privacy that students have in the public school setting, particularly given the "minimal" intrusion involved in testing. *Id.* at 78a.

4. The court of appeals reversed. Pet. App. 1a-45a. The court agreed that this case is governed by the "analysis in *Vernonia*," but it held that a different result was required than in *Vernonia*. *Id.* at 9a. The court of appeals recognized "that, like athletes, participants in other extracurricular activities have a somewhat lesser privacy expectation than other students." *Id.* at 21a. In addition, the court recognized that the character of the intrusion in this case is "virtually identical" to that in *Vernonia*, because of the similarities in the testing process under both policies. *Id.* at 22a. However, the court held that, unlike *Vernonia*, the nature and immediacy of the government concern at issue here "tips the balancing analysis decidedly in favor of [respondents]." *Ibid.* In particular, the court faulted the evidence of the underlying drug problem in this case. *Id.* at 14a-18a.

Judge Ebel dissented. Pet. App. 28a-45a. He would have upheld the school district's policy under *Vernonia*. In his view, "*Vernonia* does not require that a school district allow illegal drugs to gain a stronghold among its schoolchildren before it may take steps to eliminate them through random

[4] Respondents do not challenge the policy as applied to students involved in interscholastic athletics.

drug testing." *Id.* at 38a. As he explained, "[i]llegal drugs * * * are nearly impossible to eliminate once they have garnered a foothold in our communities, schools, and homes." *Id.* at 38a-39a. Further, Judge Ebel reasoned that the evidence of drug use in this case was comparable to that in *Vernonia*. *Id.* at 38a. Judge Ebel also concluded that "the majority place[d] too little weight on the fact that the testing here is limited to extracurricular activities, where the students have voluntarily submitted themselves to additional supervision and regulation." *Id.* at 39a-40a.

SUMMARY OF ARGUMENT

In response to increasing community concern over illicit drug use in Tecumseh schools, petitioners adopted a random drug-testing policy for all students who wish to participate in extracurricular interscholastic competitions, including non-athletic activities. That policy is reasonable, and thus satisfies the Fourth Amendment, under the same considerations that this Court looked to in upholding the random drug-testing policy for student athletes in *Vernonia School District 47J* v. *Acton*, 515 U.S. 646 (1995).

A. The privacy interests in this case are identical to those in *Vernonia*. As *Vernonia* reaffirmed, privacy interests are greatly diminished in the public school context. In that regard, the "most significant" (515 U.S. at 665) consideration identified in *Vernonia*—that the policy was adopted by a school district fulfilling its guardianship responsibilities to its students—is just as forceful here. In addition, as was true with respect to the student athletes in *Vernonia*, the already-diminished expectations of the general study body at Tecumseh High are further diminished with respect to students who participate in an interscholastic competition covered by the school district's policy. Students who participate in such activities, athletic or not, are subject to added academic and conduct requirements.

B. The character of the intrusion complained of in this case is, if anything, less significant than in *Vernonia*. The manner of testing, the information that is obtained, and the uses to which such information is put are the same here as in *Vernonia*, except in two respects. The policy here requires that *all* students be permitted to provide specimens from behind a "closed stall," whereas the policy in *Vernonia* only required that female students be permitted to do so. In addition, unlike *Vernonia*, the policy here expressly requires that information concerning prescription medications remain confidential. In *Vernonia*, this Court characterized the degree of intrusion involved in testing as "negligible" and "not significant." 515 U.S. at 558, 660. It is even less significant here.

C. The court of appeals erred in concluding that the government concern at issue in this case was insufficient to justify the limited intrusion into students' diminished privacy interests. As this Court recognized in *Vernonia*, the government has a compelling interest in deterring, not just detecting, drug use among school children. The perils of student drug use are numerous and well-documented. The court of appeals was wrong to suggest that the school district's interest is materially different here on the ground that student athletes face a higher risk of injury from drug use than students covered by the policy in this case, many of whom face comparable risks. Quite apart from its interest in minimizing the risk of injury from drug use, the school district also has a strong interest in ensuring that those students who represent Tecumseh High and their community at interscholastic competitive events do so drug-free.

The court of appeals also erred in concluding that the government's concern was not sufficiently "immediate." First, this Court's drug-testing cases make clear that, although a "demonstrated problem of drug abuse" may "bolster[]" the

government's interest, such evidence is "not in all cases necessary to the validity of a testing regime." *Chandler* v. *Miller*, 520 U.S. 305, 319 (1997). In that regard, the record in *Vernonia* by no means establishes a constitutional floor for justifying a student drug-testing policy. Second, the record of the drug problem at Tecumseh, including among students covered by the policy, is much closer to the actual evidence of drug use in *Vernonia* than the court of appeals acknowledged. Third, the court failed to give appropriate deference to the first-hand judgments of local school administrators as to the severity of the drug problem and need for action. Fourth, the court failed to appreciate that *deterring* drug use so that it does not take root and spread is every bit as important, if not more so, as detecting drug use at a school that already has a drug epidemic.

D. Balancing those considerations, the Court should conclude that the drug-testing policy in this case is reasonable and thus constitutional. Adopting a different approach would create a standardless inquiry under which the constitutionality of each school's drug-testing policy would turn on finely-drawn distinctions over the state of the record of drug use at that particular school, or among a particular class of students, or whether a destructive problem is already out of control. There is no reason to invite such fact-intensive litigation in every case, or to demand a school-specific inquiry into what is clearly a pervasive national problem. The Court should leave school administrators with flexibility to adopt common-sense, drug-deterrence measures like the policy at issue in this case.

ARGUMENT

THE FOURTH AMENDMENT DOES NOT PROHIBIT THE SCHOOL DISTRICT'S RANDOM DRUG-TESTING POLICY

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons * * * against unreasonable searches and seizures." The "state-compelled collection and testing of urine" is a "search" within the Fourth Amendment. *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 652 (1995). The general rule is that to be reasonable, and thus constitutional, a search must be based on individualized suspicion of wrongdoing. This Court has recognized an exception to that rule, however, for searches based on "special needs, beyond the normal need for law enforcement, mak[ing] the warrant and probable-cause requirement impracticable." *Id.* at 653 (quoting *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987)); see *National Union Treasury Employees* v. *Von Raab*, 489 U.S. 656, 666 (1989); *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989).

In *Vernonia*, this Court reaffirmed that "such 'special needs' * * * exist in the public school context," and may justify suspicionless drug testing of students. 515 U.S. at 653. That case involved a Fourth Amendment challenge to an Oregon school district's policy, which authorized random urinalysis tests of student athletes. In deciding whether that policy was constitutional, the Court considered (1) the nature of the privacy interests at issue; (2) the character of the intrusion involved; and (3) the nature and immediacy of the government concern at issue, and the efficacy of the chosen means for meeting it. Balancing those factors, the Court held that the policy was "reasonable and hence constitutional." *Id.* at 665. As explained below, a proper balancing of the same considerations leads to the identical

conclusion with respect to the substantially similar policy at issue in this case.[5]

A. As In *Vernonia*, The Privacy Interests Of Students Subject To Testing Are Greatly Diminished By The School Setting And Activities In Which They Have Chosen To Participate

1. In *Vernonia*, this Court emphasized that "[t]he most significant element" in upholding the challenged drug-testing policy was the nature of the privacy interests at issue. 515 U.S. at 665. In particular, the Court stressed "that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care." *Ibid.*; see *Chandler*, 520 U.S. at 316 (the public school context was "critical" in *Vernonia*, because of the State's guardianship responsibilities to students). The same goes for the student drug-testing policy in this case and, just as in *Vernonia*, that fact weighs heavily in favor of finding that the school district's policy is constitutional.

Under the Fourth Amendment, an examination of the legitimacy of the privacy interests at stake must begin with the setting in which the challenged intrusion arises. "What expectations are legitimate varies * * * with context, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or

[5] The Court has conducted the same balancing analysis in considering suspicionless drug-testing policies adopted by federal employers, see *Von Raab*, *supra* (upholding United States Customs Service's policy of urinalysis drug testing for employees transferred to drug-interdiction or firearm-carrying positions); *Skinner*, *supra* (upholding Federal Railroad Administration's policy of urinalysis drug and alcohol testing for rail employees involved in train accidents or who violate safety rules), and by the States, see *Chandler* v. *Miller*, 520 U.S. 305, 316 (1997) (holding unconstitutional state law requiring candidates for state public office to certify that they have passed a urinalysis drug test).

in a public park." *Vernonia*, 515 U.S. at 654 (citation omitted). The school setting of this case necessarily affects the legitimate expectations of privacy. See *New Jersey* v. *T.L.O.*, 469 U.S. 325, 339 (1985); *id.* at 348 (Powell, J., joined by O'Connor, J., concurring) ("In any realistic sense, students within the school environment have a lesser expectation of privacy than members of the population generally.").

As the Court observed in *Vernonia*: "Central, in our view, to the present case is the fact that the subjects of the [challenged drug-testing policy] are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster." 515 U.S. at 654. "[A] public school system" acts "as guardian and tutor of children entrusted to its care." *Id.* at 665. As a common-sense matter, it must do so. As this Court has recognized, a "proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." *Id.* at 655 (quoting *T.L.O.*, 469 U.S. at 339); see *id.* at 680 (O'Connor, J., dissenting) ("schools have traditionally had special guardianlike responsibilities for children"). Public schools do not stand in the same shoes as the parents of the children who fill their classrooms. *Id.* at 655. But when children enter the schoolhouse gates, they submit themselves to the temporary custody and control of their teachers and other school administrators, and must abide by their rules.

In short, the public school context greatly diminishes the legitimate expectations of privacy of students from intrusions implicating the Fourth Amendment. And from that standpoint, the students covered by the drug-testing policy here have the same diminished expectations as the students covered by the policy in *Vernonia*.

2. In *Vernonia*, the Court observed that the already-diminished privacy expectations of school children "are even *less* with regard to student athletes." 515 U.S. at 657

(emphasis added). For example, students who participate in high school athletics typically use communal facilities such as locker rooms, and may be required to change and shower in each other's presence. *Ibid.* In addition, "[b]y choosing to 'go out for the team,' [students] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally." *Ibid.* Here too, the students covered by the school district's policy, who participate in non-athletic interscholastic competitions, occupy a comparable position to the student athletes in *Vernonia*.

As both courts recognized below, "like athletes, participants in other extracurricular activities have a somewhat lesser privacy expectation than other students." Pet. App. 21a; see *id.* at 65a-66a (district court). For example, students who sign-up for competitive activities covered by the school district's policy must comply with rules and regulations not applicable to other students. The OSSAA subjects them to added academic requirements concerning such matters as class attendance and credits and, in particular, obligates them to act in a manner that does not discredit their schools. C.A. App. 80-81, 104-105. Various extracurricular squads also subject members to their own sets of rules. Pet. App. 66a. Further, as is true with respect to team sports, the activities of non-athletic extracurricular groups are monitored by faculty sponsors, imposing an added degree of supervision not experienced by other students. *Ibid.*

In addition, Tecumseh High students who participate in non-athletic interscholastic activities take overnight trips for competitions or related events. J.A. 44-45. The accommodations during such overnight trips often require students of the same sex to undress and share restroom and bathing facilities. See J.A. 109-113. To be sure, non-athletic activities typically do not entail the degree of "communal undress" (*Vernonia*, 515 U.S. at 657) to which students must submit as part of some team sports, but they nonetheless often require

students to compromise their privacy interests in a comparable fashion and to a degree that students who do not participate in such activities may avoid.

Moreover, just like the student athletes in *Vernonia*, Tecumseh students who participate in non-athletic activities covered by the policy *voluntarily* assume those added requirements and intrusions when they sign-up or try-out for the activity. And, of course, they may avoid those requirements—including drug testing—by choosing not to participate. See *Vernonia*, 515 U.S. at 666 (Ginsburg, J., concurring) (citing *United States* v. *Edwards*, 498 F.2d 496, 500 (2d Cir. 1974) (Friendly, J.)). As the school district's policy underscores, "[p]articipation in school-sponsored extra-curricular activities at the Tecumseh Public School District is a privilege." J.A. 193. Students who choose to avail themselves of that privilege "have reason to expect intrusions upon normal rights and privileges, including privacy." *Vernonia*, 515 U.S. at 657. That expectation alone seriously undercuts their Fourth Amendment claim demanding to be excused from the school district's random drug-testing policy.

B. The "Intrusion Complained Of" In This Case Is, If Anything, Less Significant Than In *Vernonia*

The next consideration is "the character of the intrusion that is complained of." *Vernonia*, 515 U.S. at 658. "[T]he degree of intrusion [caused by urinalysis testing] depends upon the manner in which production of the urine sample is monitored." *Ibid.* In *Vernonia*, the Court observed that the intrusion was "negligible," where urine samples were collected under conditions "nearly identical to those typically encountered in public restrooms." *Ibid.* Boys provided specimens at a urinal along a wall while clothed, and were observed by a male monitor only from behind; girls provided specimens from a closed stall with a female monitor standing

outside. *Ibid.* Under the policy in this case, *all* specimens—from both boys and girls—"must be collected in a restroom or other private facility behind a closed stall," while a monitor of the same sex is standing outside. J.A. 198. Therefore, the policy here actually involves a *lesser* degree of intrusion than the one in *Vernonia*.

In *Vernonia*, the Court also weighed the degree of intrusion in terms of the information disclosed by the tests, and found that it was "not significant." 515 U.S. at 660. In reaching that conclusion, the Court emphasized that the tests "look[ed] only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic"; that "the drugs for which the samples are screened are standard, and do not vary according to the identity of the student"; that "the results of the tests are disclosed only to a limited class of school personnel who have a need to know"; and that the results "are not turned over to law enforcement authorities or used for any internal disciplinary function." *Id.* at 658. As the court of appeals recognized, the drug-testing policy in this case is "virtually identical" to the policy in *Vernonia* in terms of "the information obtained, and the use to which that information is put." Pet. App. 22a.

Indeed, in this respect as well, the degree of intrusion in this case is less significant than in *Vernonia*. In *Vernonia*, the only concern that the Court noted was that the policy could be construed to require students "to identify *in advance* [of any positive result] prescription medications they are taking." 515 U.S. at 659. The Court observed, however, that such concern would be ameliorated if students were permitted to provide such information "in a confidential manner—for example, in a sealed envelope delivered to the testing lab." *Id.* at 660. Unlike the policy in *Vernonia*, the policy here explicitly calls for such confidential treatment. See J.A. 199 ("The medication list shall be submitted

to the lab in a sealed and confidential envelope and shall not be viewed by district employees.").

C. The Court Of Appeals Erred In Concluding That The Government Concern In This Case Is Of A Different Constitutional Dimension Than The One In *Vernonia*

The remaining consideration is "the nature and immediacy of the governmental concern at issue here, and the efficacy of [the challenged] means for meeting it." *Vernonia*, 515 U.S. at 660. Even though the "governmental concern" at issue and "means for meeting it" are essentially the same here as in *Vernonia*, the court of appeals concluded that "[t]his factor tips the balancing analysis decidedly in favor of [respondents]." Pet. App. 22a. In reaching that conclusion, the court emphasized that the policy here applies to non-athletic activities, and that the record of drug use here does not rise to the level of that in *Vernonia*. Neither of those distinctions is of constitutional dimension.

1. *The Policy's Application To Non-Athletes Does Not Render The Government Concern Any Less Significant.* Here, as in *Vernonia*, "[t]hat the nature of the concern is important—indeed, perhaps compelling—can hardly be doubted." 515 U.S. at 661. "Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs, which was the governmental concern in *Von Raab*, or deterring drug use by engineers and trainmen, which was the governmental concern in *Skinner*." *Ibid.* (citations omitted); see 20 U.S.C. 7102(2) ("The widespread illegal use of alcohol and other drugs among the Nation's secondary [and elementary] school students * * * constitutes a grave threat to such students' physical and mental well-being, and significantly impedes the learning process."). The compelling nature of the government

interest in deterring drug use in schools is alone sufficient to justify a drug-testing policy like the one at issue here.

Although it did not question the government's interest "in deterring drug use among students," the court of appeals suggested that that concern was less forceful here than in *Vernonia* on the ground that the risk of injury posed by drug use to student athletes is greater than to students engaged in the non-athletic activities covered by the policy in this case. Pet. App. 22a. To be sure, the linebacker faces a greater risk of serious injury if he takes the field under the influence of drugs than the drummer in the halftime band. But at the same time, the risk of injury to a student who is under the influence of drugs while playing golf, cross country, or volleyball (sports covered by the policy in *Vernonia*) is scarcely any greater than the risk of injury to a student who is drug-impaired while building a 15-foot-high human pyramid (as cheerleaders do), handling a 1500-pound steer (as FFA members do), or working with cutlery or sharp instruments (as FHA members do). See J.A. 21, 51, 75-76, 79-81. Moreover, students who participate in extracurricular activities, athletic or not, risk harm from drug use not just when they are competing, but at any time during the trips or overnight stays that they often take in connection with events. See pp. 14-15, *supra*.[6]

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[6] The court of appeals acknowledged that some of the extracurricular activities in this case "involve a safety issue comparable to that of athletics," but argued that the school district's policy nonetheless was overinclusive in that it also covered extracurricular activities (*e.g.*, academic team) that did not pose such a safety risk and was underinclusive in that it did not apply to regular school activities (*e.g.*, shop class) that might pose such a risk. Pet. App. 23a. But that also was true of the policy in *Vernonia*, which applied not only to wrestlers but to golfers, and which did not extend to shop class. In seeking to deter drug use among their students, school administrators need not act with the sort of precision demanded by a "narrow tailoring" analysis. Rather, the touchstone under the Fourth Amendment is reasonableness. And, as discussed, the school district here, like the one in *Vernonia*, had ample reason—including safety concerns—for targeting students who choose to participate in extracurricular competitions for random drug testing.

Apart from the risk of injury to students who compete in OSSAA-governed events under the influence of drugs, the school district has another weighty interest in ensuring that students who participate in such events do so drug-free: when students step onto the auditorium stage for an academic "Quiz Bowl," the fairground for an FFA event, or the basketball court for Pom Pom, they do so on behalf of Tecumseh High. As the policy itself states, "[s]tudents who participate in [covered] activities are respected by the student body and are representing the school district and the community." J.A. 193. Whatever the risk of injury from competing under the influence of drugs, the school district has a strong interest in seeing that those who represent Tecumseh High are not an "embarrassment" to the school and community, not to mention themselves. J.A. 78.

In a similar vein, in *Vernonia*, this Court recognized that the "'role model' effect" of student athletes bolstered the government's interest in testing student athletes. 515 U.S. at 663. So too here. Cheerleaders, for example, are just as likely to be role models as football players. And, as the record reflects, students who engage in non-athletic interscholastic competitions at Tecumseh High are held in "high esteem" by their fellow students. C.A. App. 995. Indeed, the success of a non-athletic team—such as Tecumseh's academic team, which was state champion in 1997 and 1998, *ibid.*—may actually call more attention to the members of that team than to members of sports teams with less success. The school district has an heightened interest in ensuring that those students do not use drugs.

At the same time, student athletes are no more entitled to protection from drugs, nor less entitled to legitimate concerns of privacy, than students who participate in non-athletic activities covered by the policy. Drawing a distinction between such students demeans both the volleyball player and the cheerleader by suggesting that one has a greater claim to privacy or is more deserving of protection from dangerous drugs than the other. There is, in short, no basis for adopting a constitutional dividing line based on whether a student chooses to participate in an interscholastic activity that is athletic, or one that is non-athletic.

2. *The School District Was Not Required To Allow Drug Use At Tecumseh To Worsen Before Adopting Its Policy.* Although the court of appeals recognized that "there was clearly some drug use at the Tecumseh schools," Pet. App. 19a, it doubted the "immediacy" of the school district's concern in addressing that problem because "the evidence of drug use among those subject to [its policy] is far from the 'epidemic' and 'immediate crisis' faced by the Vernonia schools." *Id.* at 14a; see *id.* at 24a. The court further held that "any district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group will actually redress its drug problem." *Id.* at 25a. That analysis is flawed on several different levels and, if embraced by the Court, would seriously undercut local efforts to address the pervasive national problem posed by drugs.

a. First, as this Court's drug-testing cases confirm, the record in *Vernonia* by no means establishes the constitutional floor for justifying a random drug-testing program. Indeed, as the Court explained in *Vernonia*, the record in that case suggested an "immediate crisis of *greater* proportions than existed in *Skinner*, where [the Court] upheld the

Government's drug-testing program based on findings of drug use by railroad employees nationwide, without proof that a problem existed on the particular railroads whose employees were subject to the test. And of *much greater* proportions than existed in *Von Raab*, where there was no documented history of drug use by any customs officials." 515 U.S. at 663 (citations omitted and emphasis added); see *Skinner*, 489 U.S. at 607; *Van Raab*, 489 U.S. at 673. Thus, far from raising the bar, *Vernonia* reaffirms that the government may establish a sufficiently important—and immediate—interest in adopting a random drug-testing program short of demonstrating that a societal drug problem has infiltrated a particular group of individuals.

Von Raab underscores the point. In that case, this Court specifically rejected the notion that, to justify its drug-testing program, the Customs Service was required to show drug use among the specific employees to be tested. Instead, the Court recognized that the government has a compelling interest in preventing drug use among the individuals to be tested; that there was no doubt that drug use was "one of the most serious problems confronting our society today"; and that there was "little reason to believe that American workplaces are immune from this pervasive social problem." 489 U.S. at 674. In those circumstances, the Court stated, "[i]t is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context." *Id.* at 675 n.3. Without more, the government's undeniably compelling interest in deterring drug use among school children similarly justifies the school district's effort in this case to prevent drugs from spreading (further) to the students subject to its policy.

Chandler v. *Miller* is not to the contrary. There, the Court—pointing to *Vernonia*—observed that "[a] demonstrated problem of drug abuse" may "*bolster[]*" the gov-

ernment's arguments that a drug testing program is "warranted and appropriate," but—citing to *Von Raab*—also recognized that such evidence is "not in all cases necessary to the validity of a testing regime." 520 U.S. at 319 (emphasis added). In *Chandler*, this Court invalidated a Georgia law requiring candidates for state office to certify that they had tested negative for illegal drugs. Quite unlike this case or *Vernonia*, however, in *Chandler* there not only was "no evidence" of any drug problem among individuals subject to testing, but the State affirmatively disavowed that such a problem existed. *Id.* at 319, 321. Rather, the State defended the program largely based on its "symbolic" need, and not its "'special [need]', as that term draws meaning from [the Court's] case law." *Id.* at 322.

This case illustrates the problem with the court of appeals' approach. As discussed (at 2), illegal drug use remains pervasive among America's school children. Even if drug use were not yet a crisis in Oklahoma, the government would certainly have a compelling interest in preventing that crisis from occurring. But Oklahoma is not immune from the problem. It has one of the ten highest rates in the country of reported marijuana use among students ages 12 through 17. See Office of Applied Studies, Substance Abuse & Mental Health Services Admin., *1999 Nat'l Household Survey on Drug Abuse Report* App. A, Figure A.5. The record in this case further establishes that illicit drugs have reached Tecumseh school children, including those covered by the challenged policy. See pp. 3-4, *supra*. Against that backdrop, the school district was not required under this Court's precedents to wait until drug use became an epidemic before acting to save its children.

b. Second, the evidence of drug use at Tecumseh High in fact paints a much more disturbing picture than the one portrayed by the court of appeals, including with respect to students covered by the policy. The court of appeals

characterized the record of "actual drug use" in this case as "minimal," Pet. App. 14a, and respondents similarly claim an "almost complete absence of any drug problem at all in Tecumseh," Br. in Opp. 15. That view cannot be reconciled with the record evidence, discussed above, that the school district adopted its policy in response to increasing calls for action by parents and concerned community members, and following reports by teachers, students, and parents of suspected or actual drug use among Tecumseh students (including those covered by the policy), and the discovery of drugs on school property. See pp. 3-4, *supra*.[7]

At the same time that it underestimated the drug problem at Tecumseh High, the court of appeals arguably exaggerated the record of drug use in *Vernonia*. See Pet. App. 32a (Ebel, J., dissenting) (The actual "evidence in *Vernonia* of drug use by student athletes, or even by other students attending either the school in question or other schools in the respondent school district, was quite limited."); see *id.* at 32a-34a, 41a. In other words, even accepting the court of appeals' characterization of the record in this case, the evidence of drug use in this case is not materially different from that in *Vernonia*. Moreover, in evaluating that evidence, it is important to recognize that, as this Court reiterated in *Vernonia*, a person impaired by drug use "will seldom display any outward 'signs detectable by the lay person or, in many cases, even the physician.'" 515 U.S. at

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[7] Respondents have pointed to certain statements in applications filed by the school district for funding under the Safe and Drug-Free Schools and Communities Act. See J.A. 163-192. For example, those forms state that illegal "drugs * * * are present [at Tecumseh]" but, compared to alcohol and tobacco, "have not identified themselves as major problems at this time." J.A. 191; see J.A. 180, 186. As the district court explained, those statements must be read in context and, more to the point, comprise only a part of the evidentiary record developed in this litigation. See Pet. App. 60a n.23.

664 (quoting *Skinner*, 489 U.S. at 628 (citation omitted)); see also *Von Raab*, 489 U.S. at 674. Indeed, drug users go to considerable lengths to conceal their activities. In all likelihood, therefore, the prevalence of drug use at Tecumseh High is actually greater than what the record discloses.

c. Third, the court of appeals failed to accord appropriate deference to the judgments of local school officials as to the severity of the problem and need for action. The local board of education—in which parents of school children typically are represented—occupies a far better vantage point to gauge the threat posed by illegal drugs to their own schools and children than federal appellate judges. See *Vernonia*, 515 U.S. at 665; *Board of Educ., Island Trees Union Free Sch. Dist. No. 26* v. *Pico*, 457 U.S. 853, 863 (1982) (plurality opinion) ("The Court has long recognized that local school boards have broad discretion in the management of school affairs."). The school district in this case adopted its drug-testing policy only after it had tried other anti-drug measures and had held community meetings to receive input on its proposed policy. The court of appeals erred in substituting its judgment for that of the school district as to the immediacy of the drug threat faced by Tecumseh students.

d. Fourth, as Judge Ebel explained, the court of appeals failed to take into account the unique dangers posed by illegal drugs and, in particular, the added difficulties in addressing a drug problem after drugs have become deeply entrenched in a community or its schools. See Pet. App. 38a-39a ("Illegal drugs exact a tremendous toll on their victims, and are nearly impossible to eliminate once they have garnered a foothold in our communities, schools, and homes."). In that regard, given the pervasive nature of the drug problem in schools nationwide and the incalculable damage inflicted on students and communities by illegal drugs, school administrators should have the same leeway to adopt the type of drug-testing policy at issue in this case to *maintain* a

drug-free school as they do to adopt such a policy in an overdue effort to *recreate* one. Preventing drugs from "spreading" to a school is just as important as saving a drug-infested school, and much easier to do. Indeed, in *Vernonia*, this Court discussed the need to deter drug use, not just detect it. Schools across the Nation have a uniform interest in employing drug testing to deter drug use without regard to how much drug use is, in fact, detected. In short, schools have an interest in preventing irreparable damage before it occurs.

D. Under A Proper Balancing, The School District's Drug-Testing Policy Is Reasonable And Thus Constitutional

Balancing the foregoing factors leads to the same result here as in *Vernonia*: the school district's policy "is reasonable and hence constitutional." 515 U.S. at 665. Indeed, as discussed, the "most significant element" (*ibid.*) in *Vernonia*—the government's guardianship responsibilities to children in the public school context—is present in equal measure here, and the "the intrusion complained of" here is, if anything, less significant than in *Vernonia*. The only consideration that could alter the mix is the nature and immediacy of the government concern at issue. Whatever the differences between the record of drug use in this case and in *Vernonia*, the school district was more than justified in deciding that it was time to adopt an added deterrent in the form of random drug testing of covered students.

A contrary conclusion would plunge the administrators of the Nation's public schools into a Fourth Amendment regime in which virtually any random drug-testing policy could be subjected to costly, fact-intensive litigation in which the constitutionality of one policy versus another would turn on finely drawn distinctions between, for example, how many marijuana cigarettes were discovered at one school as opposed to another; how many members of the football team

had been caught for or suspected of drug use as opposed to members of the cheerleading squad; or whether it was more dangerous for a student to wrestle another student under the influence of drugs or to handle a steer. Neither students nor schools would benefit from such a microscopic approach to the "special needs" analysis of *Vernonia*.

There is no need to require such case-specific, and ultimately standardless, inquiries into efforts to address a national problem like drug use in our schools. The government has a compelling interest in preventing the spread of this "pervasive societal problem" (*Von Raab*, 489 U.S. at 675 n.3), and schools across the country have an equally compelling interest in ensuring that they do not become engulfed by that problem. Efforts to draw fine distinctions about the incidence of drug use in one school versus another will only frustrate implementation of needed solutions. The Court should leave schools flexibility to adopt reasonable measures, like the policy in this case, to prevent illicit drugs from gaining a stronger hold on their communities, and protect school children from the life-altering perils of drug use.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 2001

(4)

No. 01-332

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

BOARD OF EDUC. OF INDEPENDENT SCHOOL DIST. NO. 92 OF POTTAWATOMIE COUNTY,

Petitioner,

v.

EARLS, ET AL.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE DRUG-FREE SCHOOLS COALITION; NATIONAL INSTITUTE OF CITIZEN ANTI-DRUG POLICY; MALCOLM K. BEYER, JR.; DRUG-FREE KIDS: AMERICA'S CHALLENGE; DRUG-FREE AMERICA FOUNDATION; NATIONAL FAMILIES IN ACTION; INSTITUTE ON GLOBAL DRUG POLICY OF THE DRUG FREE AMERICA FOUNDATION; LEGAL FOUNDATION AGAINST ILLICIT DRUGS; DRUG AND ALCOHOL TESTING INDUSTRY ASSOCIATION; THE HON. JOHN E. PETERSON, MEMBER OF CONGRESS, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a public school must have a drug problem among its students to create a "special need" to conduct random drug and alcohol testing on the students to deter the students from drug and alcohol use.

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

TABLE OF AUTHORITIES..... iv

INTEREST OF *AMICI*..... 1

SUMMARY OF THE ARGUMENT..... 1

LIST OF AMICI..... 2

POINT ONE
BECAUSE DRUG AND ALCOHOL USE BY STUDENTS INTERFERES WITH THE FUNDAMENTAL PURPOSE OF PUBLIC SCHOOLS AND STUDENTS HAVE A DIMINISHED EXPECTATION OF PRIVACY, PUBLIC SCHOOLS HAVE A "SPECIAL NEED" TO IMPLEMENT RANDOM DRUG TESTING OF STUDENTS TO DETER SUBSTANCE USE AND TO HELP SCHOOLS ACHIEVE THEIR FUNDAMNETAL PURPOSE.... 5

POINT TWO
BECAUSE PUBLIC SCHOOLS HAVE A "SPECIAL NEED" TO RANDOMLY TEST STUDENTS FOR SUBSTANCE USE, PUBLIC SCHOOLS ARE NOT REQUIRED TO SHOW DRUG OR ALCOHOL USE BY STUDENTS PRIOR TO IMPLEMENTING RANDOM TESTING. THE NEED TO DETER DRUG USE BY STUDENTS IS A RATIONAL BASIS FOR UPHOLDING RANDOM DRUG TESTING..... 19

a. Schools do not have to show drug use among students to implement random testing when drug testing is a condition of participating in voluntary privileges such as athletics or other extracurricular activities..... 21

TABLE OF CONTENTS – Continued

Page

POINT THREE
SUSPICION-BASED DRUG TESTING IS NOT A REASONABLE ALTERNATIVE TO RANDOM TESTING..... 25

POINT FOUR
IF SOME SUBSTANCE USE MUST BE SHOWN TO JUSTIFY TESTING, THE STANDARD IS SATISFIED IF THERE IS "SOME EVIDENCE" OF STUDENT SUBSTANCE USE..... 28

CONCLUSION..... 29

TABLE OF AUTHORITIES

Page

CASES

Anable v. Ford, 653 F. Supp. 22 (W. D. Ark. 1985) 7

Aubrey v. School Bd. of Lafayette Parish, 148 F.3d 559 (5th Cir.1998) 7

Brennan v. Board of Trustees, 691 So. 2d 324 (La. Ct. App.1997) 7

Brousseau v. Town of Westerly, 11 F. Supp. 2d 177 (D.R.I. 1998) 7

California v. Latasha W., 70 Cal. Rptr. 2d 886 (Cal. Ct. App.1998) 7

Chandler v. Miller, 520 U.S. 305 (1997) 28

Colorado Seminary v. N.C.A.A., 570 F.2d 320 (9th Cir.1978) 22

Committee for G.I. Rights v. Callaway, 518 F.2d 466 (CA DC 1975) 30

DesRoches, 11 v. Caprio, 156 F.3d 571 (4th Cir. 1998) 7

Florida v. J.A., 679 So. 2d 316 (Fla. Dist. Ct. App.1996) 7

Goss v. Lopez, 419 U.S. 565 (1975) 29

Griffin v. Wisconsin, 483 U.S. 868 (1987) 8

Hamilton v. Tennessee Secondary School Athletic Ass'n, 552 F.2d 681 (6th Cir. 1976) 22

Hedges v. Musco, 33 F. Supp. 2d 369 (D.N.J. 1999) ..7, 26

Jevic v. Coca Cola, 5 I.E.R. Cases 765, 1990 WL 109851 (D.N.J. 1990) 24

TABLE OF AUTHORITIES – Continued

Page

Joy v. Penn-Harris-Madison School Corp., 212 F.3d 1052 (7th Cir. 2000).....7, 20

K.L. et al. v. Bd. of Ed. of Hopewell Valley Regional School Dist., 1991 S.L.D. 1322 (School Law Decisions, N.J. Commissioner of Education)..... 23

Knox County Educ. Ass'n v. Knox County Bd. of Educ., 158 F.3d 361 (6th Cir. 1998), *cert. denied*, 528 U.S. 812 (1999) 7, 9, 28

Loder v. City of Glendale, 927 P.2d 1200 (1997) *cert. denied*, 522 U.S. 807 (1997) 24

Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) 8

Miller v. Wilkes, 172 F.3d 574 (8th Cir. 1999).....7, 20

Mitchell v. Louisiana High School Athletic Ass'n, 430 F.2d 1155 (5th Cir. 1970)..... 23

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) 8, 21, 30

New Jersey v. T.L.O., 469 U.S. 325 (1985).....5, 6, 14, 15

New Jersey Transit PBA Local 304 v. New Jersey Transit Corp., 151 N.J. 531 (1997)..... 21

O'Connor v. Bd. of Education, 645 F.2d 578 (7th Cir. 1981), *cert. denied*, 454 U.S. 1084 (1981); *on remand*, 545 F. Supp. 376 (N.D.Ill. 1982) 22

Pierce v. Smith, 117 F.3d 866 (5th Cir. 1997)..... 7

TABLE OF AUTHORITIES – Continued

Page

Plyler v. Doe, 457 U.S. 202 (1982) 13

Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309 (7th Cir. 1988) 15

Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) 8, 26, 30

Superintendent v. Hill, 472 U.S. 445 (1985) 29

Todd v. Rush County Schools, 983 F. Supp. 799 (SD IN 1997), *affd*, 133 F.3d 984 (7th Cir. 1998) 6

Todd v. Rush County Schools, 133 F.3d 984 (7th Cir. 1998), *cert. denied*, 119 S.Ct. 68 (1998) .. 15, 20, 23, 24

Trinidad Sch. Dist. No. 1 v. Lopez, 963 P.2d 1095 (Colo. 1998) 9

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 8

United States v. Skipworth, 482 F.2d 1272 (5th Cir. 1973) 24

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Wisconsin v. Angelia D.B., 564 N.W.2d 682 (Wis. 1997) 7

FEDERAL STATUTES

U.S. Constitution Amendment IV 5, 6, 7, 27

TABLE OF AUTHORITIES – Continued

Page

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144 *Congressional Record* S345-02,S362 and see 144 *Congressional Record* H11044-03, H11228 10

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Page

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Page

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INTEREST OF *AMICI*[1]

We dedicate this brief to the families who have lost children to drugs and alcohol. May we ever be mindful of their loss.

Amici are parents, grandparents, students, parent and other drug-prevention organizations, corporations, and distinguished legal, medical and scientific experts, policy makers, and others who all share a common dedication to helping schools and children become drug and alcohol-free. Our vulnerable school children have been prey to drug traffickers for too long. The international makeup of the *Amici* reflects the international concern that illicit drug use is undercutting traditional values and threatening the very existence of stable families, schools, communities, and government institutions throughout the world.

SUMMARY OF THE ARGUMENT

Amici assert that because drug and alcohol use by students interferes with the fundamental purpose of public schools and students have a diminished expectation of privacy, public schools have a "special need" to implement random drug testing of students in order to deter substance use and to help the schools achieve their fundamental purposes of educating and protecting young people.

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[1] The parties have consented to the filing of this brief. (See Appendix A.) Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Because public schools have this "special need" to randomly test students for substance use, the schools are not required to show drug or alcohol use by students prior to implementing random testing. The need to deter drug use by students is a rational basis by itself for upholding random drug testing.

Even if some substance use must be shown to justify testing, the standard is satisfied if there is "some evidence" of student substance use in support of the testing. The school can gather the necessary information by having a hearing on the subject prior to implementing a drug testing program.

LIST OF AMICI

Alex J. Romero, Arizonans for Drug-Free Youth and Communities; Ambassador Melvyn Levitsky, Professor of International Relations and Public Administration, Syracuse University, Syracuse, NY; Angie Heim, Green Bay, Wisconsin; Arlene Seal, Ph. D., Positive Moves, Creating a Safe and Healthy World, PA; Australian Parents for Drug-Free Youth, Maryborough Queensland, Australia; Because I Love You (BILY), Chadds Ford, PA; Bensinger DuPont & Associates, Bethesda, MD; Beverly Kinard, President Christian Drug Education Center, Canon City, CO; Carla Lowe, Carmichael, CA; Daniel Bent, Esq., former U.S. Attorney, District of Hawaii; Debra K. Delp, Don't Be An Ostrich, Chadds Ford, PA; Doctors for Life, Kloof, South Africa; Donald Ian Macdonald, M.D, F.A.S.A.M, former White House Drug Policy Advisor, Bethesda, MD; Donnie R. Marshall, former Administrator U.S. Drug Enforcement Administration (DEA); Dr. Verel R. Salmon, Superintendent of Schools, Millcreek Township School District, Erie, PA; Drug Watch-Minnesota, David Taylor, LCDC,

LSW, Duluth, MN; Drug and Alcohol Testing Industry Association, Alexandria, VA; Drug-Free Kids: America's Challenge, Carolyn Burns, Vice President, Louisville, KY; Drug-Free Kids: America's Challenge, Joyce Nalepka, President, Silver Spring, MD; Drug-Free America Foundation, Inc., St. Petersburg, FL; Drug Watch-Hawaii, Chair, Jeanette McDougal, MM,CCDP, Honolulu, HI; Drug-Free Schools Coalition, Flemington, NJ; Educating Voices, Inc., Naperville, IL; Eleanor Scott, Westminster, CO; Eric Voth, MD, Topeka, KS; Erie County Drug and Alcohol Coalition, Erie, PA; General Arthur Dean, Community Anti-Drug Coalitions of America (CADCA), Alexandria, VA; Gerri Silverman, Short Hills, NJ; Ginger Katz, Courage to Speak Foundation, Inc., Norwalk, CT; H. E. R. O. I. N. Hurts, Inc. Middletown, DE; Harry F. Connick, Esq., District Attorney of New Orleans, LA; Institute on Global Drug Policy of the Drug-Free America Foundation, St. Petersburg, FL; Institute for Behavior & Health, Bethesda, MD; International Students in Action, Oxford, England; John C. Lawn, former Administrator, U.S. Drug Enforcement Administration (DEA); John Keith, Esq., Cox Hanson, Halifax, Nova Scotia, Canada; John Wertime, Arlington, VA; Julie Murdoch, Esq., Bensinger, DuPont & Associates; June M. Milam, Jackson, MS; Kathleen Berry, Mother of Divine Grace Drug Awareness Group, Philadelphia, PA; Larry Katz, Courage to Speak Foundation, Inc., Norwalk, CT; Leah Cox , Concerned Citizens for Drug Prevention, Inc. Hanover, MA; Legal Foundation Against Illicit Drugs, St. Petersburg, FL; Linda B. Ledger, Vice President of the New Jersey Federation for Drug-Free Communities; Maine

South Alliance for Drug-Free Youth, William Breault, Worcester, MA; Malcolm K. Beyer, Jr., Jupiter, FL; Michael J. DeFeo, Avitar, Inc., Canton, MA; Mina Seinfeld de Carakushansky, former Drug Prevention Secretary of the City of Rio de Janeiro, Brazil; MOMSTELL, Kathy Berry, Philadelphia, PA; Nancy Starr, Pennsylvania Delegate, Drug Watch International, Erie, PA; National Families in Action, Atlanta, Georgia; National Family Partnership, Dade County, FL; National Hispano/Latino Community Prevention Network; National Institute of Citizen Anti-Drug Policy, DeForest Rathbone, Great Falls, VA; Nora L. Drexler, President/CEO, Kids Interacting Drug-Free Coalitions of America, Teen Anti-Drug Coalitions of America, Erie, PA; Northwest Center for Health and Safety, Portland, OR; Otto and Connie Moulton, Committees of Correspondence, Danvers MA; Otto Hauswirth, M.D., International Scientific and Medical Forum on Drug Addicts, Austria; Peggy Sapp, President, Informed Families of Dade County, FL; Peter Bensinger, former Administrator U.S. Drug Enforcement Administration (DEA); Reed Irvine, Accuracy in Academia, Accuracy in Media, Washington, D.C.; Richard Bucher, Ph.D.; Robert L. Dupont, M.D., former Director National Institute on Drug Abuse (NIDA); Robert B. Charles, Esq., former Chief Counsel and Staff Director to House of Representatives Speaker's Task Force on Drugs; Ruby Schaaf, R. N., The Chemical People, Erie County, PA; Sharon Smith, MOMSTELL (Moms on a Mission to Advocate for Drug Treatment, Education and to Lobby for Legislation), Mechanicsburg, PA; Stephanie Haynes, Save Our Society From Drugs (S.O.S.), Alpine, TX ; Steven H. Steiner,

Dads and Mad Moms Against Drug Dealers; Substance Abuse Program Administrator's Association, Ira Jane Hurst-Romero, C-SAPA, Germantown, MD; Susan Gillespie, Arlington, VA; TEAMCares, Inc., Joyce Lips, Chair of the Board of Directors, Las Vegas, NV; The Hon. John E. Peterson, Member of Congress; Thomas A. Constantine, former Administrator U.S. Drug Enforcement Administration (DEA); Tinker Cooper, Families Against Drugs, Orlando, FL; Tommy Jones Foundation, Granite Quarry, NC; Wev Shea, Esq., former U.S. Attorney, District of Alaska, Anchorage, AK; William R. Caltrider, Jr., President, Center for Alcohol and Drug Research and Education, Towson, MD

POINT ONE

BECAUSE DRUG AND ALCOHOL USE BY STUDENTS INTERFERES WITH THE FUNDAMENTAL PURPOSE OF PUBLIC SCHOOLS AND STUDENTS HAVE A DIMINISHED EXPECTATION OF PRIVACY, PUBLIC SCHOOLS HAVE A "SPECIAL NEED" TO IMPLEMENT RANDOM DRUG TESTING OF STUDENTS TO DETER SUBSTANCE USE AND TO HELP SCHOOLS ACHIEVE THEIR FUNDAMENTAL PURPOSE

The Fourth Amendment to the United States Constitution provides that the government shall not violate the right of the people to be secure in their persons against unreasonable searches. *U.S. Constitution Amendment IV*. Normally, searches are only permitted upon probable cause and a warrant. This privacy protection against unreasonable searches applies to all levels of government and covers students in public schools. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). A drug test is considered a

"search" of a person's bodily fluids, thus, students who are subject to drug testing by a school must have their privacy interests weighed against the school's interest in testing to determine if the testing is "reasonable" under the Fourth Amendment. *Vernonia School District v. Acton*, 515 U.S. 646, 652-653 (1995).[2]

In *Vernonia School District v. Acton*, the Supreme Court (hereinafter "the Court") sought to resolve the issue of whether a school's interest in deterring high school athletes from using drugs through the use of random drug testing outweighed the privacy interest of the students. The Court upheld the drug testing program by focusing on the need of schools to conduct testing but reserved the question of whether drug testing programs may be extended to other contexts, such as extracurricular activities. The instant case will decide that issue.

Since 1985, the Court has recognized that public school students maintain a diminished expectation of privacy within the school system. *New Jersey v. T.L.O.*, 469 U.S. at 348. In school search cases, the courts now apply a "special needs" analysis to determine whether searches in public schools are reasonable under the Fourth Amendment, i.e., there must be a "special need" of the school to conduct a search that makes it impracticable to require the school to have probable cause and a warrant before conducting the search.[3]

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[2] The term "drug test" in this brief can apply to drug and alcohol tests. "Drug" means a drug that is used illegally. Alcohol for minors is an illegal substance.

[3] See, *Todd v. Rush County Schools*, 983 F. Supp. 799 (SD IN 1997) *affirmed* by 113 F.3d 984 (7th Cir. 1998), *cert. denied*, 119 S.Ct. 68 (1998); *Hedges v. Musco*, 33 F. Supp. 2d 369 (D.N.J. 1999); *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361 (6th Cir. 1998), *cert. denied*, 528 U.S. 812 (1999) (school mandatory, suspicionless drug and alcohol testing of teachers was constitutional and other officials in "safety-sensitive" positions); *DesRoches, 11 v. Caprio*, 156 F.3d 571 (4th Cir. 1998) (proposed search of a student backpack was reasonable); *Aubrey v. School Bd. of Lafayette Parish*, 148 F.3d 559 (5th Cir. 1998) (school's interest in mandatory, suspicionless drug testing of employee outweighed employee's privacy interests due to school employment context); *Pierce v. Smith*, 117 F.3d 866 (5th Cir. 1997) ("special needs" existed when "student-employee" with diminished expectations of privacy was drug tested subsequent to an alleged violation of hospital policy by slapping a disorderly patient); *Brousseau v. Town of Westerly*, 11 F. Supp. 2d 177 (D.R.I. 1998) (government's interest in safety of students was compelling and urgent enough to authorize warrantless pat-down search of student when large knife was missing from the school cafeteria); *Anable v. Ford*, 653 F. Supp. 22 (W. D. Ark. 1985) (school policy requiring drug testing of any student who violated school substance abuse code was improper and unconstitutional but voluntary alcohol test was proper); *California v. Latasha W.*, 70 Cal. Rptr. 2d 886 (Cal. Ct. App. 1998) (random metal detector weapon search of high school students did not violate the Fourth Amendment); *University of Colo. v. Derdeyn*, 863 P.2d 929 (Colo. 1993) (university's random drug testing of student athletes was held to be unconstitutional); *Florida v. J.A.*, 679 So. 2d 316 (Fla. Dist. Ct. App. 1996) (school policy permitting random, suspicionless weapons searches of students was reasonable); *Brennan v. Board of Trustees*, 691 So. 2d 324 (La. Ct. App. 1997) (student-athletes had diminished expectation of privacy in face of a university's and NCAA's significant interests in student drug testing); *Wisconsin v. Angelia D.B.*, 564 N.W.2d 682, (Wis. 1997) (search of student and student's coat was reasonable); *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999) (extracurricular); *Joy v. Penn-Harris*

If a school has a "special need," the courts have recognized that mandatory, suspicionless drug testing is

"reasonable" in certain instances. In applying this "special needs" rationale to drug testing in public schools, the courts balance the following factors: (1) the nature and immediacy of the governmental concern; (2) the nature of the student's privacy interests; and (3) the character of the intrusion. *Vernonia School District v. Acton*, 515 U.S. at 646.

In the instant case we expect that the Court will also deal with the first of these factors, the nature of the governmental interest, by providing guidance on whether a school must show evidence of drug use by students to justify random drug testing of students in athletics or extracurricular activities.[4]

The Court has stated that "The importance of deterring drug use by all this Nation's schoolchildren cannot be doubted." *Vernonia School District v. Acton*, 515 U.S. at 646. *Amici* agree with the Court and assert that the evidence shows that drug and alcohol use by students is a

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Madison School Corp., 212 F.3d 1052 (7th Cir. 2000) (extracurricular and parking on campus); in non-school contexts see, *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *Griffin v. Wisconsin*, 483 U.S. 868 (1987)

[4] Random selection means a mechanism for selecting students for drug tests that (1) results in an equal probability that any student from a group of students subject to the selection mechanism will be selected, and (2) does not give a school discretion to waive the selection of any student selected under the mechanism. *Developing Drug-free School Policies and Procedures*, Drug-Free Schools Coalition, PMB 327, 203 Main St., Flemington, NJ 08822, phone 908-284-5080.

compelling interest that justifies drug testing of students to deter drug use.

When drugs invade a school, threatening the safety of students and disturbing the orderly learning environment, the school's interest in ridding the school of drugs outweighs the privacy interests of students. The school years are a critical passage in a young person's life. While in school, children face the challenge of learning in the academic, social, physical, and emotional realms. When drugs infect a school, the learning process is crippled. Children become casualties (several of the *Amici* have lost children to drugs or alcohol). The physical and psychological effects of drug and alcohol use can cause lifelong and profound losses. Substance use decreases a child's chances of graduation and academic success. It creates danger in classrooms and increases the risk of accidents when students drive to and from school. Researchers continually report statistics demonstrating that student drug and alcohol use is at a dangerous level.[5] For example, the National Center on Addiction and Substance

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[5] See *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361, 375 n.12 (6th Cir. 1998), *cert. denied*, 528 U.S. 812 (1999) (the prevalence of drug use by our nation's youth is beyond dispute); see, *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1110 (Colo. 1998). In this case, an independent research firm, the Search Institute of Minneapolis, Minnesota, conducted an attitudinal and behavioral survey on the school's students, finding that 44% of students in grades six through twelve had used drugs in the last year. Of the sixth-grade students, 23% used drugs in the last year, and an alarming 63% used drugs in the eleventh grade. Further, 63% of the school's seniors had at least used marijuana once during their lives, while 13% reported using cocaine at least once. Also, 20% of the eighth graders frequently used drugs. Drug-use at the school exceeded

Abuse (CASA) at Columbia University reports that for the last six years school children have listed drugs as the most important problem they face.[6]

According to the 2000-2001 Parents' Resource Institute for Drug Education (PRIDE) survey, 39% of 12 graders smoked marijuana in the last year, 7.9% used cocaine, 11.3% used hallucinogens, and 62.4% drank alcohol. PRIDE obtains data from more than 8,500 school systems and 7.5 million students in 49 states. The surveys are designated by Congress as a measure of illicit drug use by youth.[7]

The National Household Survey conducted by the federal Department of Health and Human Services measures substance use in the general population age 12 and older. The 1999-2000 survey had 50,000 youths (12-17) participating in the survey. The survey indicates that there are 9.7 million underage drinkers in the U.S., including 6.6 million who are binge drinkers. On the

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national averages by a significant margin (noting that only 35% senior marijuana use and 6% cocaine use compared to Trinidad's 63% and 13% usage, respectively). *Id.* at 1098-99.

[6] "Collective Statistics Concerning Drug Use", Drug Enforcement Administration, Demand Reduction Section, Compiled February 2001 citing the CASA National Survey of American Atitudes on Substance Abuse VI: Teens, February 28, 2001. The CASA survey is available from CASA at www.casacolumbia.org

[7] 144 *Congressional Record* S345-02, S362 and see 144 *Congressional Record* H11044-03, H11228, see www.pride surveys.com

average day, 3,814 youths try marijuana for the first time.[8]

In 1997, a survey of middle and high school students, teachers, principals, and parents was conducted for the National Center on Addiction and Substance Abuse (CASA) at Columbia University.[9] The study revealed that high school students see more drug deals at school than in their neighborhoods. The study reports the following:

> 76% of high school students claim that drugs are kept, used or sold on school grounds.
>
> 29% of high school students claim that a student in their school died from a drug or alcohol-related incident in the past year.
>
> 74% of high school students claim that a student was expelled or suspended for possessing, using or selling drugs in the past year.
>
> Teens are more likely to encounter drugs on school grounds or in their schools than on their neighborhood streets: more high school students have witnessed drug sales at school (41%) than in their neighborhoods (25%).

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[8] 2000 National Household Survey (Department of Health and Human Services, Washington, DC) www.samhsa.gov

[9] *1997 CASA National Survey of Teens, Their Parents, Teachers and Principals*, Joseph A. Califano and Alyse Booth, The National Center on Addiction and Substance Abuse at Columbia University, September 1997. CASA did a study in 1998 the *1998 CASA National Survey of Teens, Teachers and Principals* with similar results. They are available from CASA at www.casacolumbia.org

Teens, parents, teachers and principals support firm steps to keep drugs out of schools, including drug testing of students.

Most teachers (57%) believe that drugs have diminished the quality of education in our nation's schools.

A 2001 study by CASA revealed that substance abuse adds at least $41 billion dollars to the costs of elementary and secondary education in terms of special education, teacher turnover, truancy, property damage, injury, counseling, and other costs.[10]

There is a definite correlation between drug use and dropouts. Students who drink alcohol or use drugs are statistically less likely to graduate from high school than those who abstain.[11] Students leaving school with an inadequate education are more likely to be unemployed, to depend on the welfare system, and to commit violent

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[10] *Malignant Neglect: Substance Abuse and America's Schools.* The National Center on Addiction and Substance Abuse at Columbia University, September 5, 2001, available from CASA at www.casacolumbia.org

[11] Select Comm. on Narcotics Abuse and Control, 99th Cong., 2d Sess., Drugs and Dropouts 2 (Comm. Print 1986). An increased dropout rate harms not only the students dropping out, but the entire society. Dropouts cost the nation billions during their lifetimes. See also, Subcommittee on Econ. Growth, Trade, and Taxes, 102d Cong., 1st Sess., Doing Drugs and Dropping Out 52 (Comm. Print 1991). See Tetsuji Yamada, et al., "The Impact of Alcohol Consumption and Marijuana Use on High School Graduation" 13 (National Bureau of Econ. Research Working Paper No. 4497, 1994).

crimes.[12] Recent studies confirm that students who use drugs are more likely to bring guns and knives to school leading to school violence.[13] Drug use is implicated in a significant number of suicides and homicides among adolescents.[14]

A strong correlation between drug use and juvenile delinquency is documented in a study sponsored by the United States Department of Justice's Office of Juvenile Justice and Delinquency Prevention. The study drew on data from three projects that studied some 4000 youths over a five year period. The study found that the more involvement a youth had with drugs, the more likely that youth was involved in delinquency. The findings (by age 16 one-half of the youths studied were using alcohol on a

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[12] See, e.g., *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (noting that inadequate education adds "to the problems and costs of unemployment, welfare, and crime"); Carlos Villarreal, "Culture in Lawmaking: A Chicano Perspective", 24 *U.C. Davis L. Rev.* 1193, 1205 (1991) (noting increased welfare, job-training, and incarceration costs "attributable to inadequate education"). See also, "Drug Use, Negative Outcomes Linked in Dropout Study", *Alcoholism and Drug Abuse Week*, Aug. 21, 1995, at 2 (explaining that drug use is a good predictor of school dropout patterns). The study surveyed a group of 1243 adolescent dropouts in California. Reports indicated that 29.5% of the dropouts tried an illegal drug by the age of twelve, compared to only 8.3% of students that age still in school. The dropouts' weekly rates of alcohol, marijuana, and cocaine use were two, five, and ten times the rates of use by students attending school.

[13] DuRant, et al. "Weapons Carrying on School Property Among Middle School Students," *Journal of the AMA*, Vol. 153, No. 1, January, 1999.

[14] U.S. Pub. Health Serv., Alcohol and Other Drug Abuse in Adolescents, 50 *Am. Fam. Physician* 1737 (1994).

regular basis and about 25% were using marijuana), prompted the researchers to recommend that prevention programs begin as early as elementary school.[15]

Drug use can interfere with memory, sensation, and perception. Drugs distort experience and can cause a loss of self-control that can lead users to harm themselves or others. They interfere with the brain's ability to take in and analyze information. Drug use can have an insidious effect on perception; for example, cocaine and amphetamine users often have a false sense of functioning at their best while using the drugs. Drug use erodes self-discipline and motivation which is essential for learning.[16]

The Court has recognized a school's duty to maintain an adequate learning environment, a component of which is that students are restrained from using drugs. Schools must be allowed to use all reasonable means to combat drug and alcohol use if education is to be successful. As the Court has stated, "the effects of a drug-infested school are visited not just upon the user, but upon the entire student body and faculty, as the educational process is disrupted." *Vernonia School District v. Acton*, 515 U.S. at 662. In *New Jersey v. T.L.O.*, 469 U.S. at 342 n.9, the Court noted that "The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and

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[15] Stuart Greenbaum,"Drugs, Delinquency, and Other Data", *Juvenile Justice*, Spring/Summer 1994, at 2, 3, 6.

[16] See, John Brick, *Drugs the Brain and Behavior, The Pharmacology of Abuse and Dependence* (Haworth Medical Press, New York, 1998).

committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities." Drug problems among students are "one of the particularly ugly forms in which school disciplinary problems commonly arise in present-day America." *Id.* at 339. The Seventh Circuit Court of Appeals noted that "If the schools are to survive and prosper, school administrators must have reasonable means at their disposal to deter conduct which substantially disrupts the school environment." *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1324 (7th Cir. 1988); see also *Todd v. Rush County Schools*, 133 F.3d 984, 986 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 68 (1998) (citing *Schaill* for the same proposition).

The Court has noted that maturing nervous systems are more critically impaired by intoxicants than mature ones are and childhood losses in learning are lifelong and profound. Children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. *Vernonia School District v. Acton*, 515 U.S. at 661.[17]

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[17] Quoting Richard A. Hawley, "The Bumpy Road to Drug-Free Schools", 72 Phi Delta Kappan, 310, 314 (1990); see also Todd W. Estroff *et al.*, "Adolescent Cocaine Abuse: Addictive Potential, Behavioral and Psychiatric Effects," 28 *Clinical Pediatrics* 550, 555 (1989) (concluding that there is a direct causal link between the progression and severity of cocaine abuse and the progression and severity of addictive psychiatric, and psychobehavorial systems among the adolescents); Kandel, et al., "The Consequences in Young Adulthood of Adolescent Drug Involvement," 43 *Archives of Gen. Psychiatry* 746, 753 (1986) (following 1004 young men and women from ages 15 and 16 to age 25 and observing that prior use predicts future use and

Students who avoid drug use during their high school years are not likely to subsequently use drugs; but if they later do, they more easily can stop using them. A comprehensive study of about 10,000 sixth and seventh grade students in 57 schools in the state of Washington showed that students whose peers had little or no involvement with drinking or drugs scored higher on standard math and reading tests than students whose peers used alcohol or drugs.[18]

Drug testing can help students stay away from drugs. Drug testing gives students a reason to say "no" when their peers ask them to use drugs.

Our young people state that drugs are their number one problem. Adults must listen. We must recognize that adults can help. Many schools have anti-drug programs, including student drug testing programs, that have proven to be highly effective in substantially reducing drug use.[19] Random drug testing is a narrow exception

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that "[u]se of a drug initiates a cascade of events and consequences that is amplified by the regenerative interaction of initial drug use and its subsequent use").

[18] "Impact of Peer Substance Use on Middle School Performance in Washington" Division of Alcohol and Substance Abuse, Department of Social and Health Services, State of Washington, Seattle, Washington, http://www.hspc.org

[19] See Nancy J. Flatt-Moore, "Comment & Note, Public Schools and Urinalysis: Assessing the Validity of Indiana Public Schools' Student Drug Testing Policies After *Vernonia*," 1998 *BYU Educ. & L.J.* 239, 240 n.7.

intended to give schools a stronger weapon to get drugs out of schools. School drug testing programs are a proven low-cost method to win the fight for our children's future. Schools implementing drug testing experience a substantial reduction in drug use.[20]

Drug testing is an extremely effective deterrent as was proven by the Hunterdon Central Regional High School in Flemington, New Jersey. Prior to implementing random drug testing in 1997, the school conducted a survey of student drug use. The survey took students about 35 minutes to complete and covered their history of drug and alcohol use and the frequency and intensity of their current substance use. The survey has built in controls to ensure accuracy and to detect erroneous or exaggerated responses with approximately 40 different consistency checks.[21]

After conducting the 1997 survey, Hunterdon Central implemented mandatory random drug testing for all student athletes. Approximately half of the student body participated in athletics. Prior to implementing random

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[20] Willard Daggett, *Achieving Civility at School: A Case Study* (Leadership Press, book can be ordered from the Intl. Center for Leadership in Education, Rexford, NY 12148, phone 518-399-2776); for additional information contact: Natl. Inst. of Citizen Anti-Drug Policy, 1044 Springvale Rd., Great Falls, VA 22066; Drug-Free Schools Coalition, PMB 327, 203 Main St., Flemington, NJ 08822, phone 908-284-5080.

[21] The American Drug and Alcohol Survey is available from RMBSI, Inc., 419 Canyon, Suite 316, Fort Collins, CO 80521, telephone 800-447-6354: the Hunterdon Central study is available from the Drug-Free Schools Coalition at 203 Main St, PMB 327, Flemington, NJ 08822, 908-284-5080, fax 908-284-5081.

testing, the school had in place a student counseling and education program and conducted drug searches. In 1999, the survey was conducted again. There had been no changes in the school anti-drug program except the introduction of random testing.

The 1999 survey showed that of the 28 categories of drug use evaluated by the survey, drug use went down in 20 categories. For example, in the highest risk drug use category of "Multi-Drug Users" the rates went down as follows:

9th grade – 57% decrease

10th grade – 100% decrease

11th grade – 14% decrease

12th grade – 52% decrease

Random drug testing has proven effective in decreasing drug use by students. Drug testing programs in other contexts has also enjoyed remarkable success.[22]

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[22] David G. Evans, *Drug Testing Law Technology and Practice* (West Group 1991) Sections 105-6; see, e.g., Stephen M. Fogel, et al., "Survey of the Law on Employee Drug Testing", 12 *U. Miami L. Rev.* 553, 561 n.34, 562 (noting 65% to 80% success rate rehabilitating company employee drug users as well as drop in U.S. Navy drug use from 47% in 1981 to 4% in 1984).

POINT TWO

BECAUSE PUBLIC SCHOOLS HAVE A "SPECIAL NEED" TO RANDOMLY TEST STUDENTS FOR SUBSTANCE USE, PUBLIC SCHOOLS ARE NOT REQUIRED TO SHOW DRUG OR ALCOHOL USE BY STUDENTS PRIOR TO IMPLEMENTING RANDOM TESTING. THE NEED TO DETER DRUG USE BY STUDENTS IS A RATIONAL BASIS FOR UPHOLDING RANDOM DRUG TESTING

One of the questions before this Court is the level of drug use required before a school can implement random drug testing. In *Vernonia School District v. Acton*, 515 U.S. at 665, the Court permitted random drug testing of high school athletes. Because the athletes were drug ringleaders and the school was in a state of virtual rebellion, this decision has been misinterpreted by some to hold that a school must be "out of control" with drugs before testing is authorized. However, the specific facts in *Vernonia* regarding the high incidence of drug use among student athletes were merely noted by the Court with other significant factors to support the immediacy of the governmental concern. *Vernonia School District v. Acton*, 515 U.S. at 662-3. The Court did not require that specific evidence of drug or alcohol use by students be demonstrated to satisfy the showing of a "special need." The special need stems from the facts that children are more susceptible to the ill effects of drug and alcohol use than adults and that drug and alcohol use not only hurts the students themselves but causes disruptions and discipline problems that harm the educational process in general. *Vernonia School District v. Acton*, 515 U.S. at 654-55. To require a school to show drug use by students before testing means that the students must already be suffering

from the detrimental effects of drug use before a preventative measure can be taken. It is the same as requiring that there be an epidemic before inoculations can occur.

The Court has observed that schoolchildren routinely submit to mandatory physical examinations, vaccinations against disease, vision and hearing tests, dental and dermatological tests, and scoliosis screening. These are preventative measures that do not require a showing that these diseases are rampant in the school. *Vernonia School District v. Acton*, 515 U.S. at 656.

In the case of *Todd v. Rush County Schools*, 133 F.3d 984 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 68 (1998), a logical extension of the *Vernonia* decision was applied to students who participate in all extracurricular privileges, and not just athletics. In upholding the school's voluntary random drug testing of all students who participated in extracurricular activities, the Seventh Circuit placed little significance on whether the school district had an acute drug problem. Rather, the court merely noted that a survey of the school in 1994 revealed that students in certain grades used cigarettes and alcohol more than the state average, while marijuana use in certain grades was actually lower than the state average. *Id.* at 985. In *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999), the court determined that deterrence of the use of drugs in school, even absent an immediate crisis or any record of a drug problem at the school, is a sufficient reason to allow a school to engage in random drug testing. *Id.* at 580. See also, *Joy v. Penn-Harris-Madison School Corp.*, 212 F.3d 1052 (7th Cir. 2000) (drug testing was reasonable for extracurricular activities and for students parking at school).

The courts have upheld drug testing in non-school contexts where an employer could not show an increase in, or even a problem with, drug use. See, e.g., *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668-69, 673-74 (1989) (upholding testing for Customs Services employees). See also, *New Jersey Transit PBA Local 304 v. New Jersey Transit Corp.*, 151 N.J. 531, 564 (1997) (no drug problem among transit officers). Thus, a school's inability to demonstrate an out of control drug problem to a court should not prohibit the Court from finding that a school has a legitimate interest in deterring student drug use. *Vernonia School District v. Acton*, 515 U.S. at 665.

a. Schools do not have to show drug use among students to implement random testing when drug testing is a condition of participating in voluntary privileges such as athletics or other extracurricular activities.

When students wish to exercise the privilege of participating in extracurricular activities, they do so voluntarily, and must submit to any of a number of conditions placed on that participation. Extracurricular activities are privileges sponsored by the school to which the school commits money, facilities, and human resources. Because of the expense and devotion of resources, schools have the right, if not the obligation, to ensure that the funds devoted to these activities are well spent on sober and alert participants. Students should be given the opportunity to take full advantage of these experiences by having classmates who are drug free.

In addition, schools often heavily regulate extracurricular activities, frequently requiring a dress code, minimum grade point average, and mandatory attendance and even regulation of free speech. Finally, the school remains in "custody" of the students participating in athletics or extracurricular activities even when such activities are not on school grounds and is responsible for their safety and health, especially when a school staff member supervises the participants. *Vernonia School District v. Acton*, 515 U.S. at 657. These conditions naturally flow from the school's obligation to maintain order, safety and discipline in the school, particularly in the arena of athletics, where the injury risk is greater. *Id.* at 662.

Further, students voluntarily enroll in the extracurricular activities because these are privileges that convey a benefit. These privileges carry with them enhanced prestige, benefits and possible leadership roles. As such, these students serve as an example to other students creating a "role model" effect which could filter down to all students at school whether or not involved in activities.

Students do not have a right to these privileges. For example, it is well settled that participation in interscholastic athletics is not a constitutional right protected by the United States Constitution. See, e.g., *Colorado Seminary v. N.C.A.A.*, 570 F.2d 320 (9th Cir. 1978); *Hamilton v. Tennessee Secondary School Athletic Ass'n*, 552 F.2d 681 (6th Cir. 1976). Nor is such participation a property right. *O'Connor v. Bd. of Education*, 645 F.2d 578 (7th Cir. 1981), *cert. denied*, 454 U.S. 1084 (1981); *on remand*, 545 F. Supp. 376 (N.D.Ill. 1982). Such activities are also outside the

protection of due process. *Mitchell v. Louisiana High School Athletic Ass'n*, 430 F.2d 1155 (5th Cir. 1970). See also *K.L., et al. v. Bd. of Ed. of Hopewell Valley Regional School Dist.*, 1991 S.L.D. 1322 (School Law Decisions, N.J. Commissioner of Education) (all extracurricular activities, up to and including commencement exercises, are considered "privileges" which can be forfeited as a result of proscribed behavior).

Student-athletes must have a preseason physical, acquire insurance coverage or sign an insurance waiver, and comply with rules of conduct, dress, grade point average, training hours and other rules as may be established for each sport. Students engaged in extracurricular activities often must also obtain insurance or sign insurance waivers for any extracurricular activity that extends the school's liability beyond the normal school-context, such as field trips, outings, events, conferences, and competitions away from school. They may have to subscribe to additional requirements, such as when the activities have required attire, training rules, or hours of practice and rehearsal, or other general regulations. Some extracurricular activities will not have the same elements of lack of privacy such as the communal undressing and locker room as athletics, but many extracurricular activities have elements of shared exposure to other student participants when performing specified activities such as the putting on of an organization's uniforms, or the general need to change into different required clothes for a particular event. See *Vernonia School District v. Acton*, 515 U.S. at 657 and *Todd v. Rush County Schools*, 133 F.3d at 986.

It follows that the voluntary undertaking of an extracurricular activity shows a student's affirmative choice to abide by a particular activity's additional rules and regulations. The court in *Todd v. Rush County Schools*, 133 F.2d at 986, summed it up by noting that: (1) all extracurricular activities are a valuable experience and a privilege with associated prestige enhancing benefits; (2) a drug testing program serves only as a condition of participation in the extracurricular activity; (3) the school's program applies only to those students who voluntarily choose to participate; (4) the students participating in activities may take on leadership roles and serve as examples to others; and (5) the school has an interest in protecting the health of the students.

Courts have held that voluntary participation in an activity that subjects a person to a search renders the search constitutionally permissible. In *Jevic v. Coca Cola*, 5 I.E.R. Cases 765, 1990 WL 109851 (D.N.J. 1990), the plaintiff challenged an employer's withdrawal of an employment offer when the applicant failed a drug test. The court held that if the plaintiff "felt the test was in any way humiliating, his ever present option was to walk away." *Id.* at 1990 WL 109851 (page 10). See also, *Loder v. City of Glendale*, 927 P.2d 1200 (1997), *cert. denied*, 522 U.S. 807 (1997) (preemployment testing). Voluntariness was also a substantial factor in the decision in *United States v. Skipworth*, 482 F.2d 1272 (5th Cir. 1973), upholding searches of persons about to fly where the court noted that passengers have every opportunity to avoid the procedure by not entering the boarding area.

Given its deterrent and non-punitive purposes as utilized by Petitioner, random testing does not bar the

student from participating, but only serves as a condition to the student's participation in the desired activity. Drug testing programs as advocated by Petitioner do not criminalize the individual student's behavior, but only protect students from injury and health risks associated with drug and alcohol use. The student makes a contract with the public school, i.e., choosing to be substance free for the privilege of participating in extracurricular activities. Because drug testing programs as advocated by Petitioner only serve a deterrent purpose, testing students who voluntarily participate in extracurricular activities is a reasonable and constitutional search.

POINT THREE

SUSPICION-BASED DRUG TESTING IS NOT A REASONABLE ALTERNATIVE TO RANDOM TESTING

Suspicion-based testing is not a reasonable alternative to random testing. There are two forms of suspicion-based testing (1) testing based on reasonable-suspicion that an individual is under the influence (2) evidence that a group of students uses drugs more than other groups of students.

Testing performed on a reasonable-suspicion basis alone will not be successful. Burdening teachers with the task of identifying drug users adds a heavy responsibility to their already time-pressured days. It is not realistic to assume that they will be monitoring students on a constant basis. Further, reasonable-suspicion testing relies on a sometimes subjective choice by a teacher which, as the Court noted in *Vernonia School District v. Acton*, may lead teachers to refer troublesome students not just those who

are suspected of using drugs. *Vernonia School District v. Acton*, 515 U.S. at 663. The Court has rejected a reasonable-suspicion standard for drug testing railroad employees as impractical because drug impaired people seldom display any outward signs detectable by lay persons or even physicians. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 628 (1989).

Suspicion-based testing may also be unreliable due to the possibility of error or bias. For example, Professor Edward Imwinkelreid, an expert in scientific evidence, has stated that when it comes to reasonable-suspicion testing in employment "there are literally hundreds of psychological studies demonstrating that lay eyewitness testimony is prone to a high degree of error. Urinalysis testing is demonstrably more reliable. The employer's personal evaluation of the employee is intensively subjective – much less objective than a urinalysis test."[23]

An example of error is found in the case of *Hedges v. Musco*, 33 F. Supp. 2d 369 (D.N.J. 1999) when a high school student was referred for drug testing based on her teacher noticing that her face was flushed, her eyes were glassy and red, her pupils appeared very wide, and she seemed very talkative and outgoing even though she was usually quiet along with other uncharacteristic behavior. A drug test was performed and it was negative.

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[23] Edward Imwinkelreid, "Some Preliminary Thoughts on the Wisdom of Governmental Prohibition or Regulation of Employee Urinalysis Testing," 11 *Nova Law Review* 563, 588 (1987).

Reasonable-suspicion testing limits the number of students tested because a reasonable-suspicion program demands particularized suspicion for every student selected and therefore generally tests fewer students than programs based on random selection. This decreases the number of drug-using students deterred and thus reduces the program effectiveness. Although reasonable suspicion may be less intrusive because fewer students are affected, the Court already has determined that the Fourth Amendment does not demand the "least intrusive" means possible. *Vernonia School District v. Acton*, 515 U.S. at 663.

Reasonable suspicion could be used to discriminate against rude students, racial or ethnic minorities, or simply unlikable students. Such discriminatory selection opens the door to student lawsuits. Random selection cures this problem by eliminating discretion in selecting students. Random testing guards against discrimination toward certain individuals or classes.

Respondents may claim that the school should only test students who are already identified as having disciplinary problems, i.e., a suspect class of likely drug users. This method is a form of reasonable-suspicion testing because it imputes suspicion of drug use on to students who break school rules. This type of testing may be underinclusive because not every student using drugs will face disciplinary charges and overinclusive because not every discipline problem involves a drug user. More importantly, the determination as to what behavior constitutes a disciplinary violation that warrants a drug test creates the same difficulties as identifying signs of drug use. Selection on such an arbitrary standard raises the

same problems with discriminatory testing that the Court has avoided through its approval of blanket testing in *Vernonia School District v. Acton*.

Requiring that a school show that student athletes and those who participate in extra curricular activities are involved in drugs more than other students is impractical. By the time the data is collected about a specific group of students and a program is put in place there would be a new group of students enrolled. The numbers could change from year to year and the school would be in a constant state of having to demonstrate documented drug and alcohol use. This could waste a considerable amount of the schools resources better spent on deterring drug and alcohol use.

POINT FOUR

IF SOME SUBSTANCE USE MUST BE SHOWN TO JUSTIFY TESTING, THE STANDARD IS SATISFIED IF THERE IS "SOME EVIDENCE" OF STUDENT SUBSTANCE USE

If a school can demonstrate that a drug problem exists, it tips the equities in favor of upholding random testing. *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361, 373-74 (6th Cir. 1998). "A demonstrated problem of drug abuse, while not in all cases necessary to the validity of a testing regime, would shore up an assertion of special need for a suspicionless general search program." *Chandler v. Miller*, 520 U.S. 305, 306 (1997).

If the Court requires documentation of a drug problem, *Amici* assert that the standard of "some evidence" be

used to find the program reasonable. *Superintendent v. Hill*, 472 U.S. 445 (1985) (some evidence required in institutional disciplinary hearing), see also *Goss v. Lopez*, 419 U.S. 565, 581-82 (1975) (holding that the due process rights of a student facing suspension are satisfied by the provision of notice and a "rudimentary" hearing).

There is a proposed New Jersey law on student drug testing that requires "Each board of education is to hold a public hearing prior to the adoption of a drug testing policy." *N.J. Senate Bill* 433, Introduced January 11, 2000. This would provide "some evidence" and would give opponents and proponents of the plan a chance to be heard. Holding a hearing will enable the school to gather data and other evidence and to hear community concerns about the testing program. *Amici* assert that this gathering of data from a hearing will be sufficient.

Such a requirement will help to prevent arbitrary deprivation of student rights without threatening school interests or imposing undue administrative burdens on the school. Ascertaining whether the "some evidence" standard is satisfied does not require a detailed examination, independent assessment of witnesses, or weighing of evidence, but, instead, the relevant question is whether there is any evidence to support the need for a school's drug testing program. *Superintendent v. Hill*, at 455.

CONCLUSION

Our nation uses random drug testing to provide for safe transportation and our national security by testing our military personnel, customs agents and railway

workers. *Committee for G.I. Rights v. Callaway*, 518 F.2d 466 (CA DC 1975) (military); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (customs agents) and *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (railroad employees). Our interest in student safety, health, and educational quality should not be derailed by student drug use and is equally compelling. We must be willing to defend our children with the same tools we use to defend our transportation system and our nation. Our children deserve no less.

Respectfully submitted,

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No. 01-332

Supreme Court, U.S.
FILED
DEC 26 2001
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 2001

BOARD OF EDUCATION OF TECUMSEH PUBLIC SCHOOL DISTRICT, Independent School District No. 92 of Pottawatomie County, and TECUMSEH PUBLIC SCHOOL DISTRICT, Independent School District No. 92 of Pottawatomie County,

v.

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DANIEL JAMES, by his next friend and mother, Leta Hagar

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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TABLE OF CONTENTS

Page

INTEREST OF THE AMICI 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. Eliminating drug use in the American public schools presents one of the greatest challenges of the twenty- first century. 3

II. Supreme Court precedent should not be so narrowly interpreted as to exclude testing students who voluntarily participate in non-athletic extracurricular activities. 10

III. *Vernonia* should not be narrowly interpreted to impose what is remarkably similar to an individualized suspicion requirement before allowing schools to enact measures designed to prevent and deter student drug use. 17

CONCLUSION 27

TABLE OF AUTHORITIES

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Case — **Page**

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Chandler v. Miller, 520 U.S. 305 (1997)..... 11

Earls v. Board of Education of Tecumseh Public Sch Dist., 115 F.Supp.2d 1281 (W.D. Okla. 2000)..... passim

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INTEREST OF THE *AMICI*[1]

The National School Boards Association (hereinafter "NSBA"), founded in 1940, is a not-for-profit federation of state associations of school boards across the United States, together with the school boards of the District of Columbia, Guam, and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members, who, in turn, govern the nation's 14,722 local school districts.

NSBA has a history of active concern in the area of drug-free schools. NSBA filed as *amicus* in this Court in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) and *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995). The NSBA Beliefs & Policies, which guide the association's actions, contain a strong statement regarding drug abuse in our nation's public schools.

> ***NSBA supports expanding efforts to address and prevent the problems raised by the use and abuse of ... drugs. NSBA supports efforts to ensure that schools and school-related activities are free from alcohol, tobacco and the aforementioned substances.***

The state school board associations of Colorado, Indiana, New Mexico, Oklahoma, Texas, and Wyoming join the NSBA. The state associations represent all or nearly all of the local public school boards in their respective states. In addition, NSBA is joined by the Texas Association of School Boards ("TASB") Legal Assistance Fund, which is composed of nearly 750 Texas school districts. The TASB Legal Assistance Fund is governed by three organizations: the Texas Association of School Boards, the Texas Association of School Administrators, and the Texas Council of School Attorneys.

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[1] The Amici file this brief with the consent of all parties. No counsel for a party authored this brief in whole or in part. No person or entity, other than the Amici, their members or their counsel made a monetary contribution for the preparation or submission of this brief.

Penn-Harris-Madison School Corporation is a public school district in northern Indiana, enrolling over 9,000 students. The district was party in the suit, *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052 (7th Cir. 2000).

Joining with this group of educators is W.A. Drew Edmondson, as Attorney General of the State of Oklahoma. The Office of the Attorney General has an active interest in combating juvenile drug use.

The issues of drugs in the schools and maintaining a safe environment for students are of major concern to school districts and law enforcement officials throughout the country.

SUMMARY OF THE ARGUMENT

Drugs are one of the most serious problems facing the American public school system today. Where traditional methods of anti-drug education have failed to stop the proliferation of drugs in the schools, many school boards have turned to programs of random, suspicionless drug testing in reliance on this Court's decision in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995).

The decision of the *Earls* majority below unnecessarily restricts the availability of random, suspicionless drug testing under *Vernonia* in two ways. First, the *Earls* majority gave little weight to the fact that the Tecumseh school board ("Tecumseh") sought only to test students who volunteered to participate in extracurricular activities. The courts that have approved student drug testing policies, including this Court in *Vernonia*, have all made it clear that the voluntary nature of the activities in question greatly reduced the privacy interests of the students involved. The fact that *Vernonia* only dealt with student athletes was not dispositive to that decision.

Second, by requiring the school district to present evidence of serious drug use among the specific student groups to be tested, the *Earls* majority usurped the school board's responsibility for managing the school district and imposed a requirement at odds

with the stated goal of deterrence. While the "epidemic" of drug use found in *Vernonia* was a factor to be weighed against the students' privacy interests, it was not a determinative requirement.

ARGUMENT

I. Eliminating drug use in the American public schools presents one of the greatest challenges of the twenty-first century.

The plague of illicit drug use which currently threatens our nation's schools adds a major dimension to the difficulties the schools face in fulfilling their purpose - the education of our children. If the schools are to survive and prosper, school administrators must have reasonable means at their disposal to deter conduct which substantially disrupts the school environment.[2] As we enter the twenty-first century, American public schools are no longer expected merely to teach reading, writing, and arithmetic. Schools are now required to provide instruction in subjects as diverse as health education, sex education, and morality. Public schools are also being asked to shoulder the burden of feeding students breakfast and lunch, offering before and after school child care services, and providing medical and psychological services.

The changing role of the American public schools reflects the changes in our society in general. As society is impacted by the plagues of drugs and violence, so too are the schools and the educational environment. For at least the past twenty years, the United States has publicly committed itself to the *War Against Drugs*. One of the eight National Education Goals passed by Congress in 1994 was that: "By the year 2000, every school in the United States will be free of drugs, violence, and the unauthorized presence of firearms and alcohol and will offer a disciplined environment conducive to learning."[3] The Safe Schools Act of

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[2] *Schaill v. Tippecanoe County Sch. Corp.*, 864 F2d 1309, 1324 (7th Cir. 1988).

[3] 20 U.S.C.A.§5812(7)(A) (West 2001).

1994[4] was passed in part to help schools achieve their drug-free goal. It is within this context that schools must also ensure that the environment within their buildings is safe and conducive to learning.

A significant element in providing a safe and effective learning environment is the elimination of drugs and violence on school property and the deterrence of drug use among the student population. One of the most troubling problems with which public schools have had to contend in recent years has been the increase in the availability of drugs at school, the use of drugs by students, and the number of violent acts committed at school. According to a recent survey, 65.3 percent of students aged 12 through 19 reported that drugs were available at school.[5] That same survey noted that 14.6 percent of the student population reported they had been victimized at school. Several other studies have tracked illicit drug use by students in grades 8 through 12 and have concluded that drug use by students continues to be a problem. The *1998 National Education Goals Panel Report* showed that 40 percent of 10th graders used illicit drugs in 1997; which was up from 24 percent in 1991.[6] For the year 2000 the University of Michigan reported that 53.9 percent of high school seniors had used an illicit drug by the time they reached their senior year of high school.[7]

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[4]20 U.S.C.A.§5961(b) (West 2001).

[5]*Students' Report of School Crime: 1989 and 1995*, U.S. Department of Justice, Bureau of Justice Statistics, School Crime Supplement to the National Crime Victimization Survey, Spring 1989 and 1995.

[6]*National Indicator #20, National Education Goals Panel Report*, The National Education Goals Panel, http://www.negp.gov/98info/chap2/webpg410.html#ind20 (1998).

[7]*High School Youth Trends, 2001 Monitoring the Future Study*, National Institute on Drug Abuse, http://www.drugabuse.gov/Infofax/HSYouthtrends.html, December 21, 2001.

As stated by the Director of the National Institute on Drug Abuse, "Since 1991 drug use has been increasing among America's youth. To counter these trends, we must strengthen drug abuse prevention efforts at the Federal, State, and local levels."[8] The National Center for Educational Statistics reports the following:

- [A]fter reaching its lowest point in the early 1990s, drug use at any time during the previous year by high school seniors began to increase again for most drugs. For example, the percentage of seniors who reported using marijuana at any time during the previous year increased from 22 percent in 1992 to 38 percent in 1998.

- Between 1991 and 1998, the percentage of 8th, 10th, and 12th graders who reported using marijuana, smoking cigarettes, or using any illicit drug other than marijuana in the previous 30 days increased.

- In 1998, more 8th, 10th, and 12th graders reported that it would be "fairly easy" or very easy to obtain marijuana than did their counterparts in 1992.[9]

Other reports relate that 40.9 percent of high school seniors and 36.4 percent of high school sophomores indicate they used illegal drugs in the previous year.[10] One third of the nation's secondary

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[8]National Institute on Drug Abuse, National Institutes of Health, *Preventing Drug Use among Children and Adolescents: A Research Based Guide* (1997).

[9]National Center for Educational Statistics, http://nces.ed.gov/pubs99/condition99/indicator-27.html (last visited Dec. 20, 2001).

[10]http://www.publicagenda.org/issues/factfiles_detail.cfm?issue_type= llegal_drugs&list=5 (last visited Dec. 20, 2001).

students reported they had been offered, sold, or given an illegal drug on school property.[11]

Drug use affects a student's mind and body. This Court has already recognized that "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe."[12] Additionally, studies also show that some discipline problems in school, such as fighting, truancy, and vandalism, correlate with student use of alcohol and other drugs.[13] This correlation was evident in *Vernonia School District 47J v. Acton*,[14] this Court's leading case involving student drug use, where administrators and teachers reported a direct correlation between rising drug use and the number of disciplinary referrals, which had doubled since the early 1980s.[15] Finally, students impaired by drugs not only affect their own learning but disrupt the learning of others and the overall educational environment. This Court has noted that the effects of a drug-infested school "are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted."[16]

While schools have taught health education for many years and have been given federal dollars for drug education programming, studies indicate that classroom instruction is simply not enough. Even the district court in *Vernonia* noted that "[s]imply telling [students] that drug use is bad for their health and that they should

[11]Laura Kann, Ph.D., et al., *Youth Risk Behavior Surveillance–National Alternative High School Youth Risk Behavior Survey*, Centers for Disease Control and Prevention (1998).

[12]*Vernonia*, 515 U.S. 646, 661 (1995).

[13]*See e.g.* B. Bowman, *Aggressive and Violent Students; Statistics on Violence*, Developmental Resources, Inc. (1994).

[14]515 U.S. 646 (1995).

[15]*Id.* at 648-649.

[16]*Id.* at 661.

stop using is invariably ineffective."[17] As a consequence, many school boards have had to turn to other methods of curbing drug use. One of the most effective methods is the deterrent effect of random drug-testing. The policy adopted by Tecumseh is typical of the policies adopted by school districts across the nation in the wake of this Court's *Vernonia* decision. Such policies are designed to identify and help students who are using drugs, and to protect other students from the disruption and dangers posed by students using illegal drugs. They are not designed to be punitive. Under the Tecumseh policy, if a student tests positive the student is not disciplined or punished academically; instead, the student and the student's parent are offered help, such as a student assistance program or a drug rehabilitation program.[18] The Tecumseh school board has undertaken its responsibility in "furtherance of [its] responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."[19]

In 1995, this Court offered public schools a potent weapon in their fight against drug use by students. In *Vernonia School District 47J v. Acton*,[20] the Court allowed a school district to randomly and without individualized suspicion test the school's student athletes for drug use. Drug tests are searches governed by the Fourth Amendment,[21] and the *Vernonia* decision was grounded in this Court's earlier landmark school search case, *New Jersey v. T.L.O.*[22]

[17]*Acton v. Vernonia School District 47J*, 796 F.Supp. 1354, 1357 (D.Or. 1992), *rev'd*, 23F.3d 1514 (9th Cir. 1994), *vacated by* 515 U.S. 646, *remanded to* 66 F.3d 217 (9th Cir. 1995).

[18]*Earls v. Board of Education of Tecumseh Public Sch. Dist.*, 115 F.Supp.2d 1281, 1291 n.40 (W.D. Okl. 2000).

[19]*Vernonia*, 515 U.S. at 665.

[20]515 U.S. 646 (1995).

[21]*See id.* at 652; *see also Treasury Employees v. Von Raab*, 489 U.S. 656, 665 (1989).

[22]469 U.S. 325 (1985).

In *T.L.O.*, this Court recognized the public school setting presents special circumstances that demand accommodations of the usual Fourth Amendment requirements.[23] The *T.L.O.* Court concluded that instead of requiring "probable cause" to justify a search, school officials need only meet the lower "reasonable suspicion" standard.[24] After reviewing *T.L.O.* and other cases dealing with the limited nature of student rights in the public schools, the *Vernonia* Court concluded that "while children assuredly do not shed their constitutional rights ... at the schoolhouse gate, the nature of those rights is what is appropriate for children in school."[25]

Since *Vernonia*, courts across the nation have split on the question of what factors made the random drug testing program in *Vernonia* constitutional. Specifically, two major questions have arisen:

1) Is *Vernonia* limited to students participating in athletics, or may schools test students who join other voluntary, extracurricular activities?

2) What evidence must a school district present of current drug use to justify random, suspicionless drug testing?

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[23]*Id.* at 337-40; "Fourth Amendment rights . . . are different in public schools than elsewhere, the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children" *Vernonia*, 515 U.S. at 656.

[24]*T.L.O.*, 469 U.S. at 341.

[25]*Vernonia*, 515 U.S. at 655-56 (internal citations omitted); *see also Florida v. J.L.*, 529 U.S. 266 (2000) in striking down a *Terry* "stop and frisk" search based upon an anonymous tip, the Court noted that "[n]or do we hold that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as airports and *schools*, cannot conduct protective searches on the basis of information insufficient to justify searches elsewhere."(emphasis added) *Id.* at 274.

Until the Tenth Circuit's decision below,[26] the Courts of Appeals appeared to agree that school districts could require students participating in non-athletic extracurricular activities to undergo random, suspicionless drug testing, without proving epidemic drug use among the narrow groups of students to be tested.[27] *Earls* is the only federal appellate court to interpret *Vernonia* as allowing random drug screenings only for students engaged in interscholastic athletic competition. The analysis in *Vernonia* warrants a broader interpretation than the one provided by the Tenth Circuit.[28] *Amici* believe the majority essentially

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[26]*Earls v. Board of Education of Tecumseh Public School District*, 242 F.3d 1264 (10th Cir. 2001).

[27]*See, e.g., Schaill v. Tippecanoe County Sch. Corp.*, 864 F2d 1309 (7th Cir. 1988); *Todd v. Rush County Schs.*, 133 F.3d 984 (7th Cir. 1998); *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999), *vacated as moot*, 172 F.3d 582 (June 15, 1999). *Joy v. Penn-Harris Madison Sch. Corp.*, 212 F.3d 1052 (7th Cir. 2000). Although the Tenth Circuit below noted that the Seventh Circuit struck down a student drug testing policy in *Willis v. Anderson Comm. Sch. Corp.*, 158 F.3d 415 (7th Cir. 1998), the policy in *Willis* required drug testing for all students who had been suspended for three days, regardless of the reason, as a condition of returning to school. *Id.* at 417. Failure to comply with the testing or failure to participate in a drug education program could result in additional punishment, including expulsion. *Id.* As such, *Willis* involved the exact situation that Justice Ginsburg noted was *not* at issue in *Vernonia*. *Vernonia*, 515 U.S. at 666 (Ginsburg, J., concurring). In light of the importance placed on the voluntary nature of the extracurricular activities at issue by the courts in cases like *Vernonia*, *Todd*, and *Miller*, and by the school district in this case, *Willis* is simply inapplicable to the issues at hand.

[28]*See, e.g.*, James M. McCray, *Urine Trouble: Extending Constitutionality to Mandatory Suspicionless Drug Testing of Students in Extracurricular Activities*, 53 Vand. L. Rev. 387 (2000); Joanna Raby, *Reclaiming Our Public Schools: A Proposal for School-Wide Drug Testing*, 21 Cardozo L. Rev. 999 (1999); Andrew P. Massmann, *Drug Testing High School and Junior High School Students After Vernonia School District 47J v. Acton: Proposed Guidelines for School Districts*, 31 Val. U. L. Rev. 721 (1997); Jacqueline A. Stefkovich, *Drug Testing of Students in Public School: Implications of Vernonia School District v. Acton for Other Types of School-Related Drug Searches*, 113 Ed. Law Rep. 521 (1996).

articulated the standards for analyzing the constitutionality of Tecumseh's policy, but failed to follow those articulated standards.[29] Specifically, *Amici* believe the *Earls* majority gave too little weight to the voluntary nature of the activities in question, and too much weight to the alleged drug "epidemic" alleged to have existed in *Vernonia*.

II. Supreme Court precedent should not be so narrowly interpreted as to exclude testing students who voluntarily participate in non-athletic extracurricular activities.

In its majority opinion below, the Tenth Circuit appeared to fear that Tecumseh's policy was merely a prelude to testing every public school student as a prerequisite for attending school.[30] Such fears are completely unfounded; while it is true that Tecumseh's policy goes further than the policy approved by this Court in *Vernonia*, in that it would apply to students who voluntarily participate in non-athletic extracurricular activities, it does not reach the question specifically reserved by Justice Ginsberg in her concurring opinion in *Vernonia*, *i.e.* whether a school can test "all students required to attend school."[31] As will be shown below, the voluntary nature of the extracurricular activities subject to testing has been a critical component of all approved policies.

This Court has repeatedly held that a suspicionless search unsupported by either probable cause or a warrant is justified by the existence of "special needs, beyond the normal need for law

[29] "I diverge with the majority only where, once again, I believe it has not actually followed the articulated conclusions and standards it has set forth for itself." *Earls*, 242 F.3d at 1283 (Ebel, J., dissenting).

[30] "Without any limitation, schools could test all of their students simply as a condition of attending school." *Earls*, 242 F.3d at 1278.

[31] *Vernonia*, 515 U.S. at 666 (Ginsburg, J., concurring).

enforcement...."[32] In *T.L.O.*, this Court concluded that public schools meet the "special needs" requirement in general, without any need to examine the factual circumstances of the specific school in question.[33] In *Vernonia*, the Court confirmed that like in the federal customs industry (*Von Raab*) and the railroad industry (*Skinner*), "[w]e have found such 'special needs' to exist in the public schools context."[34] In determining that "special needs" existed, the *Vernonia* Court did not consider the specific factual evidence of a drug problem in the Vernonia schools; that evidence was only considered later, as part of the subsequent balancing test.[35]

[32] *Vernonia*, 515 U.S. at 653 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

[33] *See T.L.O.*, 469 U.S. at 340-41.

[34] *Vernonia*, 515 U.S. at 653. In neither *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989), nor *Treasury Employees v. Von Raab*, 489 U.S. 656, 665 (1989) did the Supreme Court rely on evidence of a drug problem in the *specific group* to be tested. *Skinner* upheld a program of suspicionless drug-testing in the railroad industry based on evidence of a drug problem in the industry nationwide, without any evidence that the specific railroad in question had a similar problem, *see Skinner*, 489 U.S. at 607; and *Von Raab* approved the suspicionless drug-testing of customs officials without any evidence of a drug problem in the industry. *Von Raab*, 489 U.S. at 673. *See also Miller v. Wilkes*, 172 F.3d 574, 578 (8th Cir. 1999) "The Supreme Court has held that the public school environment provides the requisite 'special needs' so that a school district may dispense with those Fourth Amendment protections." The fact that *Miller* was vacated on the grounds of mootness does not diminish its status as persuasive authority in this case. The Eighth Circuit's decision to vacate the opinion as moot was made based on the fact that all the students bringing the legal challenge in that case had graduated by the time the rehearing occurred. *Miller*, 172 F.3d at 582.

[35] *Vernonia*, 515 U.S. at 662-663; *see also Chandler v. Miller*, 520 U.S. 305 (1997) (noting that a demonstrated problem of drug abuse is "not in all cases necessary to the validity of a testing regime." *Id.* at 319.

This Court has cautioned that "[a]s the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness'."[36] The reasonableness of a given search is judged by use of a balancing test:

> The permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate, governmental interests.[37]

In *Vernonia*, this Court identified three factors to consider in balancing the parties' respective interests:

1. the nature of the privacy interest upon which the search intrudes;
2. the character of the intrusion;[38]
3. the nature and immediacy of the governmental concern at issue, and the efficacy of the chosen means for meeting it.[39]

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[36]*Vernonia*, 515 U.S. at 652.

[37]*Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 619 (1989); *see also Miller*, 172 F.3d at 578.

[38]The second *Vernonia* factor " the character of the intrusion complained of " does not appear to be at issue in this appeal. The Tecumseh policy is virtually identical to that approved of by this Court in *Vernonia*. The Court found that requiring a student to produce a urine sample with either minimal direct observation (for male students) or no direct observation (for female students) duplicates the conditions anyone using a public restroom must face. The Court therefore ruled that the intrusion on a student's privacy interests in obtaining the urine sample was "negligible." *Id.* at 658. Even the *Earls* majority court conceded that the Tecumseh policy did not constitute a significant invasion of a student's privacy. *Earls*, 242 F.3d at 1276.

[39]*Vernonia*, 515 U.S. at 654-660.

In considering the nature of a student's privacy interest in the context of drug testing, this Court stated that "[c]entral, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster."[40] This Court emphasized that the nature of a school district's power over schoolchildren "is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[41]

As discussed above, the major difference between *Vernonia* and the Tecumseh policy is the greater inclusiveness of the Tecumseh policy, *i.e.* it covers all students participating in extracurricular activities, as opposed to limiting the program to student athletes. However, in *Todd* the Seventh Circuit held that this difference did not render a student drug testing program unconstitutional:

> [W]e find that the reasoning compelling drug testing of athletes also applies to testing of students involved in extracurricular activities. Certainly successful extracurricular activities require healthy students.[42]

While it is true that *Vernonia* noted that student athletes have a lower expectation of privacy due to the circumstances in which they change before and after sporting events, this "locker room" argument was *not* intended to suggest that non-athlete students

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[40]*Id.* at 654.

[41]*Id.* at 655.

[42]*Todd*, 133 F.3d at 986; *see also Miller*, 172 F.3d at 578-79 ("Pathe argues that the fact that the policy in *Vernonia* applied only to student athletes was more significant to the Supreme Court in reaching its decision than was the fact that the policy applied to students who were attending public school. We read the case differently.").

have an adult citizen's full expectation of privacy.[43] To the contrary, *Vernonia* prefaced the "locker room" discussion by noting that *all* students are "routinely required to submit to various physical examinations and to be vaccinated against various diseases,"[44] and that because of these medical examinations, "students within the school environment have a lesser expectation of privacy than members of the population generally."[45] This Court discussed at some length the reduced constitutional rights of *all* public schools students, noting that "for many purposes, school authorities ac[t] *in loco parentis*."[46]

With respect to the non-athlete students participating in extracurricular activities in Tecumseh, the district court noted that there was evidence in the record that such students traveled out of town and out of state more frequently than the general student population, sometimes sleeping together in a dormitory setting, sharing motel rooms, or sharing communal restroom facilities.[47] Even the *Earls* majority eventually conceded that "like athletes, participants in other extracurricular activities have a somewhat lesser privacy expectation than other students."[48] For the purpose of the *Vernonia* balancing test, therefore, *all* students participating

[43] "The Court did say that '[l]egitimate privacy expectations are even less with regard to student athletes.' That is not to say, however, that it is only the student who seeks to engage in extracurricular school sports activities whose legitimate expectation of privacy is so diminished that a search such as this one can stand up to constitutional scrutiny." *Miller*, 172 F.3d at 579.

[44] *Vernonia*, 515 U.S. at 656.

[45] *Id.* at 657 (quoting *T.L.O.*, 469 U.S. at 348) (Powell, J., concurring).

[46] *Id.* at 655 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986)).

[47] *Earls v. Board of Education of Tecumseh Public Sch. Dist.*, 115 F.Supp.2d 1281, 1290 n.34 (W.D. Okl. 2000).

[48] *Earls*, 242 F.3d at 1276.

in extracurricular activities have a lower expectation of privacy than the already reduced expectation of students in general.

Vernonia also stressed that another factor reducing the privacy expectations of student athletes is the voluntary nature of student athletics; that because a student chooses to "go out for the team," he or she "ha[s] reason to expect intrusions upon normal rights and privileges, including privacy."[49] This argument is true of all students who participate in extracurricular activities and was given short shift by the *Earls* majority. The Seventh Circuit has twice found that the voluntary nature of extracurricular activities justifies drug testing *all* students participating in extracurricular activities, due to their reduced privacy interests.[50] Any student who elects to participate in an extracurricular activity voluntarily agrees to accept additional responsibilities,[51] including participating in a drug testing program. Participation in extracurricular activities is a privilege, not a right[52] school districts are not obligated to offer

[49] *Vernonia*, 515 U.S. at 657.

[50] *See Todd*, 133 F.3d at 986; *Schaill*, 864 F2d at 1319.

[51] Students participating in extracurricular activities face additional admission requirements, *Earls*, 115 F.Supp.2d at 1289-90; and students can be removed from participation for different and often more strict disciplinary regulations, *see Todd*, 133 F.3d at 986; *Albach v. Odle*, 531 F.2d 983, 984-85 (10th Cir. 1976), and with less formal due process procedures. *Pegram v. Nelson*, 469 F.Supp. 1134, 1142 (D.N.C. 1979); *Goss v. Lopez*, 419 U.S. 565, 578 (1974).

[52] *Todd v. Rush County Schools*, 133 F.3d 984, 986 (7th Cir. 1998); *see also Poling v. Murphy*, 872 F.2d 757, 764 (6th Cir. 1989) (no protected right to participate in student council elections); *Niles v. Univ. Interscholastic League*, 715 F.2d 1027, 1029 (5th Cir. 1983); *Farver v. Board of Education of Carroll County*, 40 F.Supp.2d 323 (D.Md. 1999); *McFarlin v. Newport Special School District*, 784 F. Supp. 589, 592-93 (E.D. Ark. 1992); *Palmer v. Merluzzi*, 689 F.Supp. 400 (D.N.J. 1988); *Spring Branch Indep. Sch. Dist. v. Stamos*, 695 S.W.2d 556, 561 (Tex. 1985) ("students do not possess a constitutionally protected interest in their participation in extracurricular activities."); *Ferguson v. Phoenix-Talent School Dist.*, P.3d 943 (Or. App. 2001).

extracurricular activities. This Court should not consider the fact that the target students of the Vernonia program were athletes, as opposed to participants in any other extracurricular activity, dispositive.

By essentially ignoring the voluntary nature of the non-athletic extracurricular activities at issue below, the *Earls* majority contradicts this Court's "special needs" analysis:

> An essential, distinguishing feature of the special needs cases is that the person searched has consented, though the usual voluntariness analysis is altered because adverse consequences, (e.g. dismissal from employment or disqualification from playing on a high school sports team), will follow from refusal. The person searched has given consent, as defined to take into account that the consent was not voluntary in the full sense of the word.[53]

Our nation has daily reminders that in some situations certain privileges are conditioned on additional constraints and intrusions -- we submit to screening when we fly on a commercial aircraft or enter a government building. As Judge Friendly has noted, passengers who do not want to be searched at airports can avoid such searches by voluntarily choosing not to travel by air.[54] Likewise, students who do not wish to be drug tested can avoid such testing by voluntarily choosing not to participate in extracurricular activities.

The Tenth Circuit suggests the need for the distinction between athletes and students participating in other extracurricular activities, because "[w]ithout any limitation, schools could test all of their students simply as a condition of attending school."[55] This

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[53] *Ferguson v. City of Charleston*, 121 S.Ct. 1281, 1295 (2001) (Kennedy, J., concurring).

[54] *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974).

[55] *Earls*, 242 F.3d at 1278.

ignores, however, the critical distinction between using drug screening as a precondition to public education, and using drug screening as a precondition to participation in voluntary extracurricular activities. In her concurrence in *Vernonia*, Justice Ginsburg noted that the majority opinion was limited to students who voluntarily participate in interscholastic athletics and would not necessarily extend to all students who attend public schools.[56] Tecumseh is *not* asking its students to surrender their state constitutional right to access a public education, but is conditioning the participation in extracurricular activities -- which is a privilege, not a right -- on that concession. If students wish to exercise their privilege to participate, they must abide by a higher standard of conduct, and surrender themselves to greater scrutiny than students in the general attendance.

III. *Vernonia* should not be narrowly interpreted to impose what is remarkably similar to an individualized suspicion requirement before allowing schools to enact measures designed to prevent and deter student drug use.

The *Earls* majority's greatest problem with the Tecumseh policy stemmed from the application of the third *Vernonia* factor - the nature and immediacy of the governmental concern, and the efficacy of the chosen means for meeting it. In essence, the *Earls* majority determined that Tecumseh had not produced enough evidence to show that it suffered from the sort of "drug rebellion" of "epidemic proportions" that supposedly existed in Vernonia.[57] The difficult question facing this Court, then, is when may schools implement drug testing policies in situations that are not "rebellions" and "epidemics"? This Court has previously approved of random, suspicionless drug testing in the railroad industry based on evidence of a drug problem in the industry nationwide, without any evidence that the specific railroad in question had a similar

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[56] *Vernonia*, 515 U.S. at 666 (Ginsburg, J. concurring).

[57] *See id.* at 662-63.

problem,[58] and in the customs industry without any evidence of a drug problem in the industry.[59] Even the *Earls* majority backtracked towards the end of its opinion and acknowledged that a "drug epidemic" is not required before testing may begin:

> We do not suggest that a school must wait until it can identify a drug abuse problem of epidemic proportions before it may drug test groups of its students. Nor do we declare any bright line mark concerning the magnitude at which a drug problem becomes severe enough to warrant a suspicionless drug testing policy. We leave that to each school district.[60]

So where should the line be drawn?

Amici believe that it should be drawn well short of the standard suggested by the *Earls* majority, which would require schools to "demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem."[61] As Judge Ebel perceptively noted, this test conflicts with *Vernonia* because it would essentially reimpose the "special needs" requirement at the end of the analysis by requiring the school district to show that its policy was adopted in response to a "documented drug abuse problem," which the *Earls* majority had previously determined was a major component of the "special needs" analysis.[62]

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[58] *Skinner*, 489 U.S. at 607.

[59] *Von Raab*, 489 U.S. at 673.

[60] *Earls*, 242 F.3d at 1278.

[61] *Id.*

[62] *Id.* at 1281-83 (Ebel, J., dissenting). This argument also contradicts the majority's initial concession that *Vernonia* stood for the proposition that the public schools meet the "special needs" requirement in general, without the need to show a particular drug problem. *See Earls*, 242 F.3d at 1270; "I agree with the majority that, under *Vernonia* ... a public school district need not demonstrate a particularized 'special need' to randomly test students engaged in extracurricular activities for illegal drug use." *Id.* at 1279 (Ebel, J., dissenting).

The high level of evidence of documented drug use by the specific groups of students to be tested required by the *Earls* majority ignores the fact that this is a *balancing* test. As Judge Ebel notes in his dissenting opinion, "the majority appears to forget its earlier conclusion that there is just not much for the school district's interests to be weighed against."[63] If the privacy interests of students participating in extracurricular activities are truly diminished and the intrusion of their privacy is "not significant,"[64] then under the balancing test called for in *Vernonia* and similar cases, the balance would tip in favor of the student plaintiffs only if the interests of the school district were "truly insignificant."[65] However, in *Vernonia* this Court noted that deterring drug use among our nation's students is "important, perhaps compelling."[66] How can such a balance be said to tip in favor of the students, considering what weights are placed on each side of the scales? It is clear that the *Earls* majority treated the *Vernonia* factors not as issues to be balanced against each other, bur rather as three distinct elements, each of which the school district was required to separately establish. By doing so, the Tenth Circuit essentially re-imagined the "individualized suspicion" requirement as a sort of "associational suspicion" requirement. As this Court has noted with regards to the individualized suspicion of wrongdoing, however, "the Fourth Amendment imposes no irreducible requirement of such suspicion."[67]

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[63] *Earls*, 242 F.3d at 1283 (Ebel, J., dissenting).

[64] *Id.* at 1276.

[65] *Id.* at 1283 (Ebel, J., dissenting).

[66] *Vernonia*, 515 U.S. at 661.

[67] *T.L.O.*, 469 U.S. at 342 n.8 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976)); *see also Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (holding that individualized suspicion "is not an irreducible component of reasonableness").

Amici respectfully submit that requiring schools to present evidence of documented drug use among each subcategory of students they wish to test, as was required below, is both unworkable and inconsistent with *Vernonia*, *Skinner*, and *Von Raab*. The problem with direct evidence is that it is not particularly useful; by the time a student dies of a drug overdose from drugs received at school, it is too late for the school to do anything to help him.[68] By the time the district court considered the situation in *Vernonia*, the student body was apparently in a "state of rebellion." The more logical approach to this problem has been taken by courts such as the Eighth Circuit, which has noted that, "It is in the public interest to endeavor to avert the potential for damage, both to students who abuse and to those students, teachers, family members, and others who are collaterally affected by the abuse, before the problem gains a foothold."[69]

Because of the nature of drug use, it is rare that schools can prove it directly. Instead, most schools discover that they have drug problems based upon student self-confessed drug use revealed during annual surveys. Just as the University of Michigan conducts annual statistical surveys on student drug use on a national basis for the *Monitoring the Future Study*, so too, most states conduct statewide and districtwide surveys. Thus, for example, in *Joy v. Penn-Harris-Madison School Corporation*, the court had before it extensive evidence that the school had a very serious drug problem, with students being above the national and state averages in most categories of drug use.[70] However, self-

[68]*See, e.g., Linke v. Northwestern School Corpotation*, 734 N.E.2d 252 (Ind.App.), *on reh'g, transfer granted, opinion vacated in 58(a)* (2001).

[69]*Miller v. Wilkes*, 172 F.3d 574, 576 (8th Cir. 1999); *see also Knox County Education Association v. Knox County Board of Education*, 158 F.3d 361 (6th Cir. 1998)(holding that there need not be proof of a "pronounced" drug problem among teachers in a school before the school can constitutionally implement a drug testing program for safety-sensitive employees).

[70]212 F.3d 1052 at 1064-1065 (7th Cir. 2000).

reporting surveys cannot provide the associational or "group-specific" evidence required by the *Earls* court, because as survey questions require more self-identification by students (such as groups to which they might belong), the students' answers are likely to become less truthful due to the fear of disclosure. Most self-report surveys, therefore, are designed to test the student body as a whole, and not specific elements of the student body.

Thus schools are caught in a bind. Many schools have statistical evidence demonstrating a significant drug problem among the student body as a whole, usually paired with some anecdotal evidence of drug use. But the *Earls* court says that this is not enough: there must instead be specific evidence of drug use in the targeted categories. Must schools wait for students to die, as in *Linke*, or is it sufficient to show a more general drug problem? And how should the relevant groups be defined? If there is solid evidence of a drug problem in the marching band, but anecdotal evidence points to the brass section as the troublemakers, can the school drug test the woodwinds? *Amici* respectfully submit that in balancing the *Vernonia* factors, the courts should focus on the evidence of a drug problem in the general student population (*i.e.* usage rates above state and national averages, or direct evidence), and not on the evidence of drug use by specific subgroups of students.

Although the *Earls* majority promised to leave the determination of whether a school district had a severe enough drug problem to justify testing "to each school district,"[71] it is clear they did not do so in this case: the Tecumseh policy was overturned precisely because two judges on the Tenth Circuit disagreed with the elected Tecumseh school board as to the severity of its own drug problem. The *Earls* majority correctly stated that local school boards are in the best position to determine if their students should be required to submit to random drug testing as a condition of participating in extracurricular activities.[72]

[71]*Earls*, 242 F.3d at 1278.

[72]On October 7, 1999, the OSSBA sent a survey to all of its member school districts seeking to gauge the degree of interest of Oklahoma's

Leaving such discretion to the educators and administrators will not require courts to intervene on a school-by-school and subgroup-by-subgroup basis as seems to be taking place at the present time. The record shows that Tecumseh considered factors such as the cultural and social atmosphere surrounding the students, students openly exhibiting an attitude of approval of illegal drug use, and the community's strong concern about the issue voiced through pleas from Tecumseh parents and community for the school district to do something about the student drug abuse problem.[73] In adopting the policy in question, the Tecumseh school board was merely doing what it believed was in the best interest of the students, as confirmed by many of the community members responsible for electing them to the school board. They were seeking to ensure a safe learning atmosphere where the education of the students would not be clouded by the existence of student substance abuse.

Requiring that a specific drug problem exist before a school can implement a drug testing program is also inconsistent with the goal of *deterrence.*[74] In *Vernonia*, the Court went to great lengths

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public schools in the issue of student drug testing. Of the more than 500 surveys sent out, more than 300 responses were returned. The results showed that a number of school districts had already adopted some type of student drug testing policy. Of those schools that did not have a student drug testing policy in place, the majority of the responding school districts stated the reason was based on "unclear legal issues," and stated that they would be likely to adopt a student drug testing policy if those legal issues were clarified. On the other hand, nearly one-third of those schools that did not have a student drug testing policy in place responded that they did not see the need to adopt such a policy in their respective school district. This split clearly shows that so long as the law is clear on this issue, local school officials are more than capable than appellate judges of determining whether or not to adopt a student drug testing policy in their districts.

[73] *Earls v. Board of Education of Tecumseh Public Sch. Dist.*, 115 F.Supp.2d 1281, 1285-86 (W.D. Okl. 2000).

[74] *See, e.g., Miller*, 172 F.3d 580 (holding that the court did not believe that the lack of an immediate drug crisis "must necessarily push the Cave

to discuss the addictive dangers of drug use and called deterrence of that use important and even compelling.[75] To then say that a school must wait until the use begins to occur – and apparently until it reaches fairly high levels - makes little sense:

> We see no reason that a school district should be compelled to wait until there is a demonstrable problem with substance abuse among its own students before the district is constitutionally permitted to take measures that will help protect its schools against the sort of "rebellion" proven in *Vernonia*....[76]

The *Vernonia* Court acknowledged that waiting to catch students in the act of drug use - in other words, a program of suspicion-based drug testing - would be "impracticable" on numerous grounds.[77] As noted in *Miller*, drug testing students involved in extracurricular activities serves to deter drug use generally in the school. Tecumseh has stated that its intent in limiting its drug testing program to those engaged in extracurricular activities was not based on the premise that drug use in this portion of the student body was more prevalent, but rather that this group was chosen "in an effort to deter and hopefully eliminate drug abuse by the large part of the student population."[78] Participation in extracurricular

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City policy into unconstitutional territory, as it does not mean that the need for deterrence is not imperative.").

[75] *Vernonia*, 515 U.S. at 661.

[76] *Miller*, 172 F.3d at 581.

[77] *Id.* In rejecting the argument that drug testing based on reasonable suspicion would suffice to combat the problem, the Court refused to force school districts to turn their teachers into drug investigators, noting that "[i]n many respects, we think testing based on 'suspicion' of drug use would not be better, but worse." *Vernonia*, 515 U.S. at 664. Requiring teachers to make untrained decisions as to who has been and who has not been using drugs can lead to claims of discrimination and arbitrariness.

[78] Petitioners Cert. Brief at 6.

activities has been shown to be linked to lower drug use itself.[79] Requiring a school district to wait until it can prove serious drug use among the students to be tested to begin the testing shifts the purpose of testing from deterrence to punishment.

The inherent arbitrariness of allowing courts to determine on a case-by-case basis when drug use is "serious" enough to warrant drug testing for the purposes of deterrence is highlighted in the recent case of *Gardner v. Tulia Indep. Sch. Dist.*[80] It involves a student drug testing policy virtually identical to that of Tecumseh. Tulia ISD presented the court with a survey conducted by the Texas Commission on Alcohol and Drug Abuse ("TCADA") that showed that 27 percent of Tulia ISD students self-reported using illegal drugs, and 10 percent reported attending school "stoned."[81] In declaring the Tulia ISD policy unconstitutional, the district court ignored the TCADA survey and concluded, "no major or widespread drug problem existed within any segment of the Tulia student body."[82] The court went on to state that the schools did not have an "above-average problem with drug use by students."[83] In fact the 27 percent usage rate among Tulia students was one percentage point below the 28 percent statewide average reported in the TCADA survey.

Must a school district wait until its number of student drug-users surpasses the state average to start deterring that use? If Texas had a 28 percent student drug use rate, but Arkansas only

[79] *E.g. Nicholas Zill, et al.,Adolescent Time Use, Risky Behavior and Outcomes: An Analysis of National Data*, U.S. Department of Health & Human Services (1995).

[80] 2000 U.S. Dist. LEXIS 20253 (N.D. Tex 2000); *appeal docketed*, No. 00-11404 (5th Cir. Dec. 20, 2001).

[81] *See* Brief of the Appellants (on record with the Fifth Circuit Court of Appeals).

[82] *Gardner v. Tulia Indep. Sch. Dist*, 2000 U.S. Dist. LEXIS 20253, 5 (N.D. Tex. 2000).

[83] *Id.* at 5-6.

had a 26 percent student drug use rate, could a school district where 27 percent of the students use drugs test if it is located in Texarkana, Arkansas, but not if it is located in Texarkana, Texas? If Tulia ISD had been one percentage point above the state average (and therefore, presumably, able to test its students), but a new wave of imported drugs into Houston, Dallas, San Antonio and Austin drives the state average up, does that mean that Tulia ISD would have to stop testing until it catches up to the state average? These examples may seem far-fetched or even silly; but so is ruling that a school district where over one-fourth of the students admit to using drugs and 1 in 10 students have sat stoned in a classroom does not have a drug problem. As this Court noted over 15 years ago, "drug use and violent crime in the schools have become major social problems."[84] When the goal of a school is to deter student drug use, the current amount of actual use should be irrelevant.

One of the *Earls* majority's criticisms of the Tecumseh policy is that it constituted an ineffective means of achieving the goal of drug deterrence, because the policy only tested a select group of students (those who choose to participate in extracurricular activities) and did not test all students.[85] However, merely because a school chooses to take an intermediate step in dealing with a problem, rather than the "all or nothing" approach that the *Earls* majority seems to advocate, does not necessarily mean that the program is arbitrary or unconstitutional:

> The Legislature is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest. If the law

[84] *T.L.O.*, 469 U.S. at 339.

[85] *See, e.g., Earls*, 242 F.3d at 1277 & n.12 ("In essence, [the policy] too often simply tests the wrong students."). However, some courts have noted that at least in some school districts, a program that tested students participating in all extracurricular activities would reach a majority of the student body. For example, in Rush County, 77 percent of the student body was subject to the drug-testing program upheld by the court. *Todd v. Rush County Schs.*, 133 F.3d 984, 985 (7th Cir. 1998).

> presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. There is no doctrinaire requirement that the legislation should be couched in all embracing terms.[86]

Testing students who participate in extracurricular activities for illegal drug use on a random, suspicionless basis is a reasonable and rational first step on the road to deterrence.

While the *Earls* majority seemed to question the efficacy of random drug testing, recent research indicates that suspicionless drug testing is in fact a very effective method of reducing student drug use. Researchers from the Oregon Health and Science University recently reported on a study designed to determine the efficacy of student athlete drug testing. After comparing drug use in schools that did drug test athletes with schools that did not, the researchers concluded that there was greater drug use in the control school, i.e. the school which did *not* drug test. "Drug testing may significantly reduce drug use among adolescent athletes."[87] Dr. Goldberg's results simply reflect common sense: suspicionless drug testing is effective because not only do students fear apprehension, but also the policy gives students an obvious and instantly accepted reason to "Just Say No". Thus, contrary to the Tenth Circuit's opinion in *Earls*, drug testing a group of students is, in fact, a very effective method of addressing student drug use.

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[86] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937). *See also McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 809 (1969); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489 (1955).

[87] L. Goldberg, M.D., *"Drug Testing Adolescent Athletes: Does it Reduce Drug Usage? Results of a Prospective Randomized Trial*, Journal of Medicine in Sport and Exercise 2001, 35:5 (2001).

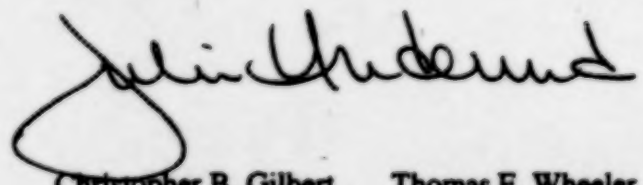
CONCLUSION

In its concise closing, the *Vernonia* Court summed up its holding as follows:

> Taking into account all the facts we have considered above -- the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search -- we conclude Vernonia's policy is reasonable and hence constitutional.[88]

Where the goal is deterrence (not punishment), and the "most significant element" of the policy is that it is "undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care,"[89] a program that allows schools to test students who volunteer for extracurricular activities for illegal drug use on a random and suspicionless basis is reasonable and, hence, constitutional.

Respectfully submitted,



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[88] *Vernonia*, 515 U.S. at 664.

[89] *Id.* at 665.

Supreme Court, U.S.
FILED
DEC 26 2001
CLERK

No. 01-332

IN THE
Supreme Court of the United States

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY AND INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY,
Petitioners,

v.

LINDSEY EARLS and LACEY EARLS, minors, by their next friends and parents, John David and Lori Earls; and DANIEL JAMES, a minor, by his next friend and mother, Leta Hager,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, GOVERNOR FRANK KEATING, U.S. SENATOR DON NICKLES, U.S. REPRESENTATIVE WES WATKINS, REPRESENTATIVE FRED S. MORGAN, THE ALLIED EDUCATIONAL FOUNDATION, and 30 CITIZENS OF POTTAWATOMIE COUNTY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

ARGUMENT 4

I. Schools Have a Compelling Interest in Preventing Student Drug Abuse 4

II. The Distinctions Between This Case and *Vernonia* Do Not Justify a Different Result 7

III. Student Drug Testing Is Reasonable in Light of Other Widely Accepted Administrative Searches . . 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases:

Dandridge v. Williams,
397 U.S. 471 (1970) 6
Jacobson v. Massachusetts,
197 U.S. 11 (1905) 6
Michigan Dep't of State Police v. Sitz,
496 U.S. 444 (1990) 6
Vernonia School District 47J v. Acton,
515 U.S. 646 (1995) 1, 7, 8, 9

Miscellaneous:

L.D. Johnston, P.M. O'Malley, & J.G. Bachman, *Monitoring the Future: National Survey Results on Drug Use 1975-2000* (2001), available at http://www.monitoringthefuture.org 5, 7

Yifrah Kaminer, *Adolescent Substance Abuse*, in Textbook of Substance Abuse Treatment (Marc Galanter & Herbert D. Kleber, eds., 1994) 4

U.S. Bureau of Justice Statistics, *Criminal Justice Sourcebook 1999* 8

Eric Wish & Bernard Gropper, *Drug Testing by the Criminal Justice System: Methods, Research, and Applications*, in Drugs and Crime (Michael Tonry & James Q. Wilson, eds., 1990) 7

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF)[1] is a non-profit public interest law and policy center with supporters in all 50 states, including many in Oklahoma. WLF devotes a substantial portion of its resources to supporting the Nation's campaign against drug abuse. To that end, WLF has appeared before this Court as well as other federal and state courts in cases involving drug testing. *See, e.g., Vernonia School District 47J v. Acton,* 515 U.S. 646 (1995); *National Treasury Employees Union v. von Raab,* 489 U.S. 656 (1989); *Willner v. Thornburgh,* 928 F.2d 1185 (D.C. Cir.), *cert. denied,* 502 U.S. 1020 (1991); *Loder v. City of Glendale,* 14 Cal. 4th 846, *cert. denied,* 522 U.S. 807 (1997). WLF also filed briefs in this case in both the district court and the court of appeals.

Frank Keating is the Governor of Oklahoma. U.S. Senator Don Nickles represents Oklahoma in the U.S. Senate. U.S. Representative Wes Watkins is a member of the U.S. House of Representatives from Oklahoma whose district includes the City of Tecumseh and Pottawatomie County. Representative Fred S. Morgan is the Minority Leader in the Oklahoma House of Representatives. Each has been a strong supporter of the right of local school boards to take whatever measures they believe, in their professional judgments, are appropriate to ensure that students do not use illegal drugs.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions. Most recently, AEF filed a brief in *U.S. Department of Housing and Urban Development v. Rucker*, No. 00-1770, arguing in support of government efforts to promote safety in public housing by cracking down on tenants and their household members who traffic in illegal drugs.

Cynthia Bell, Diana Buttram, Twila K. Carr, Elizabeth Cope, Adoris Craig, Doris Cranford, Frances L. Dare, Danita Dayton, Jeff DeWitt, Kari Etchieson, Susan Foote, Jamie Gates, Bobbette Hamilton, Lori Heffley, Caryl Hennen, Beth A. Jeffcoat, Sherri Johnson, Jimmy Jordan, Delitha A. Kolarik, Kimberly Lowe, Laurie Mallinson, Joanne Medley, Tawana Moery, Holly J. Phillips, Gary D. Rader, Lori Stacy, Don Warden, Natalie Wetzel, Pat Westervelt, and Jo Wilkins are citizens of Pottawatomie County, Oklahoma. All are either parents of students in the public school system, former parents, or employed in some capacity by the school system. All strongly support Petitioners' efforts to prevent and address drug use by students in the Tecumseh Public School District.

Amici curiae are well aware of the tragic consequences of adolescent drug use, and of data demonstrating that such drug use is a nationwide problem. They do not believe that the School Board should be required to wait until it has evidence that drug abuse is particularly rampant in Tecumseh, Oklahoma before it takes strong measures to discourage

drug use among students. Rather, in light of the nationwide nature of the drug problem, school boards should be permitted to adopt strong measures, such as student drug testing, without awaiting such evidence -- both to determine the extent of the problem and to prevent a major problem from developing.

Amici curiae are also aware that the costs of defending this suit have been a tremendous financial burden on Petitioners. Despite the Court's decision in *Vernonia* upholding student drug testing, Petitioners have been required to defend every aspect of their drug testing program, down to the most minute detail. *Amici* believe that the result of such judicial oversight of drug testing programs has been to discourage other school districts from adopting measures that might well prove effective in combating drug abuse -- for fear that adopting such measures would result in ruinous legal fees. Accordingly, *amici* support adoption of a bright-line constitutional rule in this case that will enable school districts to know what types of drug testing programs will not be subject to constitutional challenge. In that way, school districts can devote their resources to teaching students, rather than to paying legal fees.

Amici curiae are filing their brief with the consent of all parties. Letters of consent have been lodged with the Clerk of Court.

ARGUMENT

I. Schools Have A Compelling Interest in Preventing Student Drug Use

The tragic consequences of adolescent drug use are well known and should not require extended discussion.[2] Youthful bodies and minds are more vulnerable than those of adults to the adverse effects of drugs. Addiction is more likely to result when drug use begins at an early age, and the prospects of recovery from addiction are often poor. Drug use is strongly correlated to various kinds of harmful behavior including violent conduct, automobile collisions, and unsafe sexual practices. Students must necessarily come into contact with a criminal element in order to obtain drugs and may themselves engage in drug dealing or other criminal activity in order to finance drug purchases. Drug-using students have inferior academic performance and are more likely to drop out of school. In short, as this Court recognized in the *Vernonia* decision, it is hard to imagine a school district having a more compelling interest than the prevention of drug use among its students.

Drug use remains all too common among adolescents. Annual surveys of a national sample of high school seniors have been conducted by the Institute for Social Research at the University of Michigan since 1975, with funding from the U.S. Department of Heath and Human Services. Since 1991, this survey has included a cross-section of eighth and tenth

[2] See generally Yifrah Kaminer, *Adolescent Substance Abuse*, in Textbook of Substance Abuse Treatment (Marc Galanter & Herbert D. Kleber, eds., 1994), at 415-37.

grade students. The most recent report of this survey, known as the Monitoring the Future survey, was announced only a few days ago.[3] The study shows that illicit drug use at all three grade levels is down slightly from recent peak levels reached in 1996-7, but still remains at an unacceptably high level and is no longer declining. In fact, there was an increase in past-year illicit drug use by 10th and 12th graders, and past-year use is higher in all categories than was reported at the time the *Vernonia* case was submitted to the Court.

- Over 41 percent of twelfth graders, 37 percent of tenth graders, and nearly 20 percent of eighth graders reported past-year illicit drug use. Most of these student also reported current drug use (within the past 30 days).

- For eighth and tenth graders, these usage levels are nearly twice those reported in 1991 and within 2 or 3 percentage points of the highest levels ever reported.

- In comparison to the 2000 study, past-year illicit drug use by eighth graders is flat, and it is up 0.8 percentage points for tenth graders and 0.6 percentage points for twelfth graders.

In our view, the extent and serious harms of adolescent drug use would justify a school district's decision to require drug testing of all students, particularly if the results were used to encourage students to obtain counseling and treatment

[3] Available at http://www.monitoringthefuture.org. A chart from the survey, showing long-term drug-use trends, is attached hereto as an Appendix.

rather than to expel them from school. Certainly drug use is at least as harmful and prevalent as the communicable diseases that are the object of mandatory student vaccination programs. *Cf. Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

In this case, the school district's testing program was limited to students participating in competitive extracurricular activities, in part because of a concern that a broader program would be struck down by the courts. This limitation in scope does not invalidate the school's general interest in preventing drug use among its students or require justification in terms of some unique interest that applies only to drug use by students participating in these activities. Governments can attempt to solve problems on a step-by-step basis, taking into account such factors as resource limitations, legal risk, and public acceptance. *Cf. Dandridge v. Williams*, 397 U.S. 471, 486 (1970).

Similarly, the school district's selection of drugs to be tested should not be subject to any particular scrutiny. This is the sort of decision that should be entrusted to the judgment of local policymakers. *See Michigan Department of State Police v. Sitz*, 496 U.S. 444, 453-54 (1990). In particular, the exclusion of alcohol from the testing program should not be grounds for invalidation. Although alcohol abuse is a serious problem in many schools, local authorities are in the best position to determine an appropriate response. Alcohol use may be more easily detected without testing because of its odor on the breath, and alcohol testing may be

less efficacious because it is more rapidly metabolized than many other drugs.[4]

II. The Distinctions Between This Case and *Vernonia* Do Not Justify a Different Result

The principal basis for the majority opinion in the court of appeals was a finding that the drug problem in Tecumseh, Oklahoma, was not as serious as that in Vernonia, Oregon. We think the parties are in a better position to explicate the facts relating to drug abuse contained in the record below. However, this Court should also take judicial notice of the extent of drug use by young people nationwide. In our view, a school district should not have to prove that it has a particularly severe drug problem in order to justify a testing program.

Nationwide statistics show illicit drug use to be rampant among high school and middle school students, extending to all regions of the country and classes of society. There is no reason to believe that any school district in the country would be exempt from concern about this problem. While drug use survey data is not broken down by state and county, the demographic and geographic data included in the Monitoring the Future survey cited above establish a wide distribution of illicit drug use. Unfortunately, Oklahoma is not an oasis from this national scourge. In Oklahoma City, only forty miles from Tecumseh, 64.2 percent of arrested adult males

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[4] Eric Wish & Bernard Gropper, *Drug Testing by the Criminal Justice System: Methods Research, and Applications*, in Drugs and Crime 348 (Michael Tonry & James Q. Wilson, eds., 1990).

tested positive for one or more illicit drugs, a rate nearly as high as in much larger cities such as New York or Washington.[5]

The majority opinion of the court of appeals also sought to distinguish *Vernonia* on the ground that the school district's interest in preventing drug use among students participating in athletics was stronger than for those students participating in other kinds of extracurricular activities. We urge the Court to reject this invidious distinction. The risk of immediate physical harm to a drug-using athlete is only one of many valid and weighty interests the district has in preventing illicit drug use by students. The long-term harm to academic achievement and risk of addiction are certainly strong enough interests to justify testing of non-athletes as well as athletes.

To the extent justification is required, students who participate in competitive extracurricular activities are subject to less supervision from parents and school officials than are students during the normal school day. The Court should take judicial notice of the fact that out-of-town trips by students in this age group are often occasions for misconduct, including experimentation with alcohol and illicit drugs. Moreover, these activities are optional, and school officials can require consent to testing as a condition of participation without denying any student the fundamental education to which he or she may be entitled.

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[5] U.S. Bureau of Justice Statistics, *Criminal Justice Sourcebook 1999*, at 380.

In its evident hostility and strict scrutiny, the opinion of the court of appeals majority places a heavy burden on school districts that wish to initiate drug testing programs. They must be prepared to litigate, with depositions and other discovery, the precise nature of the drug problem facing their students. In addition to the expense and distraction of such litigation, there is the inevitable risk to student privacy as the district tries to put on the record every incident of past drug use that it can prove. It must also be prepared to litigate every feature of the testing program, including which students are tested and why. Finally, it faces the prospect of paying the plaintiffs' attorneys fees if it loses, as was ordered by the court of appeals below in this case. No wonder so many schools take the easy way out and drop plans for drug testing whenever legal objections are voiced. We submit that this sort of judicial hostility to student drug testing is a perversion of this Court's decision in *Vernonia*. We suggest that the Court should not only reverse the decision below but also make clear that decisions on when and how to conduct student drug testing programs should be made by school authorities and not by lower court judges.

III. Student Drug Testing Is Reasonable In Light of Other Widely Accepted Administrative Searches

Although this Court's *Vernonia* decision should be dispositive, the reasonableness of student drug testing is further demonstrated when compared with other sorts of suspicionless searches that have been approved by this Court or are widely accepted.

First, the testing program has no law enforcement purpose or effect. A positive test results in counseling and

followup testing. The most severe sanction, after three positive tests, is suspension from extracurricular activities for the rest of the year. No information is provided to law enforcement authorities. This program is unlike checkpoints for contraband or drunk drivers or airport security screening, which can result in criminal prosecution if unlawful conduct is detected.

Second, the testing program is minimally intrusive. It determines whether the tested individual has recently used an illicit drug. Information about prescription drug use is kept confidential. Otherwise, there is no exposure of personal information that the student might wish to keep confidential. It is thus less intrusive than court house and airport security screening, which often exposes the contents of luggage, briefcases, and handbags to the eyes of screening personnel and often other members of the traveling public.

Third, participation in the program is required as a condition of an optional extracurricular program. It is true, of course, that many students may regard such activities as an important adjunct to their formal education. The same could be said, however, for travel on airplanes, which may be a practical necessity for many travelers even though it is nominally a voluntary activity. Of course, automobile checkpoints are in no sense voluntary, and many individuals are required to enter court houses and other government buildings where they are subject to security screening.

Fourth, the harm to be prevented is substantial. Although not as dramatic as a terrorist attack, the toll of illicit drug use on our youth and our nation as a whole is devastating. Indeed, trafficking in narcotics to meet the

demand for illicit drugs in this country is a well-known source of funding for international terrorist groups.

In sum, student drug testing programs are at least as reasonable as most other widely accepted administrative searches in terms of constitutionally relevant criteria.

CONCLUSION

For the foregoing reasons *amici curiae* Washington Legal Foundation, *et al.*, respectfully request that the judgment of the U.S. Court of Appeals for the Tenth Circuit be reversed.

Respectfully submitted,

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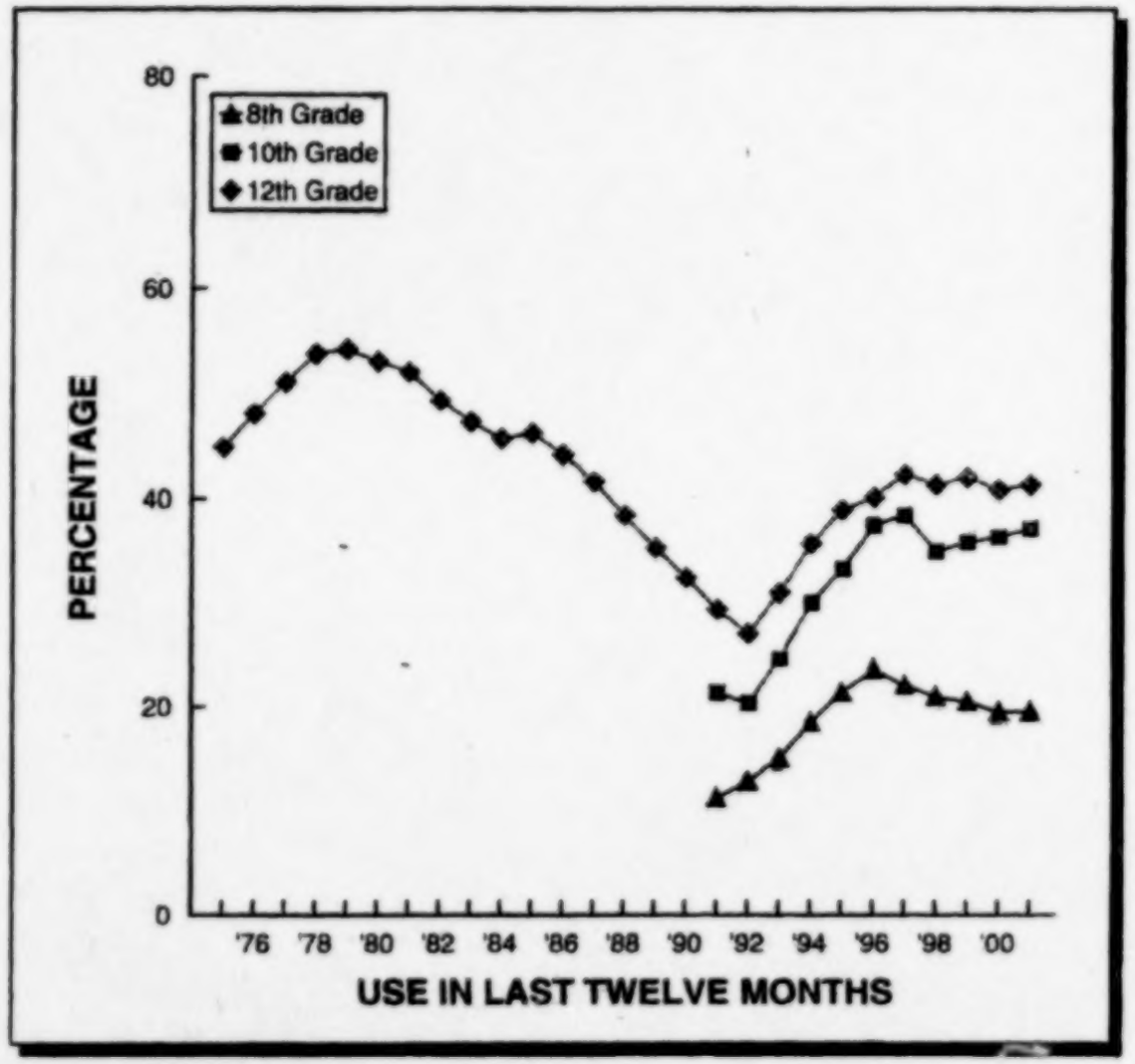
Dated: December 26, 2001

FIGURE 1

Trends in Annual Prevalence of an Illicit Drug Use Index
Eighth, Tenth, and Twelfth Graders



No. 01-332

Supreme Court, U.S.
FILED
FEB 6 2002
CLERK

In The

Supreme Court of the United States

BOARD OF EDUCATION OF IND. SCHOOL DIST. NO. 92 OF POTTAWATOMIE COUNTY, et al.,

Petitioners,

v.

LINDSAY EARLS, et al., etc.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF AMICUS CURIAE OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS, THE CATO INSTITUTE, AND COMMON SENSE FOR DRUG POLICY IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

Table of Authorities iii

Interest of *Amici Curiae* 1

Summary of the Argument 3

Argument 5

SUSPICIONLESS URINE TESTING OF NON-ATHLETE STUDENTS "DOES NOT FIT WITHIN THE CLOSELY GUARDED CATEGORY OF CONSTITUTIONALLY PERMISSIBLE SUSPICIONLESS SEARCHES" AND THUS VIOLATES THE FOURTH AMENDMENT 5

A. Our historical constitutional heritage is based on and incorporates a right of privacy – "the right to be let alone" 5

B. The requirement of individualized suspicion vs. special needs in urine testing 11

C. *Vernonia* applied 13

1. The "nature of the privacy interest" 13

2. "Character of the intrusion" is significant .. 18

3. "Nature and immediacy of the governmental concern . . . and the efficacy of this means for meeting it" 19

a. The "drug problem" at Tecumseh is virtually non-existent 19

b. The testing program here is both over- and under-inclusive 20

TABLE OF CONTENTS – Continued

Page

c. This testing program is not swift enough to justify dispensing with individualized suspicion under T.L.O. 23

d. This drug testing program sets a poor example for the students..... 24

D. Reasonableness – the ultimate question in any warrantless search..... 25

Conclusion 27

TABLE OF AUTHORITIES

Page

CASES:

Bartnick v. Vopper, 121 S.Ct. 1753 (2001) 9

Bond v. United States, 529 U.S. 334 (2000)..... 16

Boyd v. United States, 116 U.S. 616 (1886)..... 6

California Bankers Assn. v. Shultz, 416 U.S. 21 (1974) 9

Chandler v. Miller, 520 U.S. 304 (1997) ..... *passim*

City of Indianapolis v. Edmond, 531 U.S. 32 (2000) 20

Davis v. Mississippi, 394 U.S. 721 (1969) 20

Delaware v. Prouse, 440 U.S. 648 (1979) 22, 25

Donovan v. Dewey, 452 U.S. 594 (1981)..... 25

Earls v. Bd. of Education of Tecumseh Public School Dist., 242 F.3d 1264 (10th Cir. 2001)..... 13

Eisenstadt v. Baird, 405 U.S. 438 (1972)..... 9

Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765)..... 6

Ferguson v. City of Charleston, 121 S.Ct. 1281 (2001)..12, 14

Griffin v. Wisconsin, 483 U.S. 868 (1987) 24, 25

Hill v. Colorado, 530 U.S. 703 (2000) 9

Hurtado v. California, 110 U.S. 516 (1884) 7

Katz v. United States, 389 U.S. 347 (1967) 9, 10, 16

Kyllo v. United States, 121 S.Ct. 2038 (2001)..... 16

TABLE OF AUTHORITIES – Continued

Page

Marcus v. Search Warrant of Property, 367 U.S. 717 (1961) 6, 7

Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) 22

Minnesota v. Olson, 485 U.S. 91 (1990) 16

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) 12, 14, 24, 25

National Treasury Employees Union v. Von Raab, 816 F. 2d 170 (5th Cir. 1987) 14

New Jersey v. T.L.O., 469 U.S. 325 (1985) 23, 24

Olmstead v. United States, 277 U.S. 438 (1928) .. 8, 10, 24

O'Connor v. Ortega, 480 U.S. 709 (1987) 25

Poe v. Ullman, 367 U.S. 497 (1961) 7

Rakas v. Illinois, 439 U.S. 128 (1978) 16

Rowan v. U.S. Post Office Dept., 397 U.S. 728 (1970) 9

Skinner v. Railway Labor Executives' Assn., 489 U.S. 602 (1989) 11, 12, 25

Stanley v. Georgia, 394 U.S. 557 (1969) 9

Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966) 9

Trinidad School Dist. No. 1 v. Lopez, 963 P.2d 1095 (Colo.1998) 18

Union Pac. Ry. Co. v. Botsford, 141 U.S. 251 (1891) ... 7, 8

United States v. Chadwick, 433 U.S. 1 (1977) 25

TABLE OF AUTHORITIES – Continued

Page

United States v. Jacobsen, 466 U.S. 109 (1984) 15

United States v. Morton Salt Co., 338 U.S. 632 (1950) 9

Vernonia School District 47J v. Acton, 515 U.S. 646 (1995) ..... *passim*

Wilkes v. Wood, 19 How. St. Tr. 1153, 98 Eng. Rep. 489 (K.B. 1763) 6

Winston v. Lee, 470 U.S. 753 (1985) 9, 10

CONSTITUTIONAL PROVISIONS:

First Amendment 9

Fourth Amendment ..... *passim*

Fifth Amendment 9, 17

Fourteenth Amendment 9

RULES:

S.Ct. Rule 29.6 1

S.Ct. Rule 37.6 1

OTHER AUTHORITIES:

2 LEGAL PAPERS OF JOHN ADAMS 106-47 (1965) 6

THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 8

3 WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602-1791 at 1402-03 (1990) 7

TABLE OF AUTHORITIES – Continued

Page

Griswold, *The Right to Be Let Alone*, 55 Nw.U.L.Rev. 216 (1960) 8

Landynski, Search and Seizure and the Supreme Court ch. 1 (1966) 6

Lasson, The History and Development of the Fourth Amendment to the Constitution of the United States ch. 1-3 (1937) 6

Ralph D. Mawdsley & Charles J. Russo, *Random Drug Testing and Extracurricular Activities*, 159 Educ. L. Rep. 1 (2002) 17

James M. McCray, *Urine Trouble! Extending Constitutionality to Mandatory Suspicionless Drug Testing of Students in Extracurricular Activities*, 53 Vand. L. Rev. 387 (2000) 17, 22

Joanna Raby, *Reclaiming Our Public Schools: A Proposal for School-Wide Testing*, 21 Cardozo L. Rev. 999 (1999) 17

Prosser, *Privacy*, 48 Calif.L.Rev. 391 (1960) 7

Warren & Brandeis, *The Right to Privacy*, 4 Harv.L.Rev. 193 (1890) 7

INTEREST OF *AMICI CURIAE*[1]

All four of the *amici curiae* are nonpartisan organizations that oppose and have taken public stands against suspicionless drug testing. Their members are deeply concerned that the "war on drugs" has become a war on personal privacy and the Fourth Amendment. These groups have diverse backgrounds and constituencies which are allied in this common cause:

The National Association of Criminal Defense Lawyers (NACDL; www.nacdl.org) is the preeminent bar organization advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime. Founded in 1958, NACDL has more than 10,000 lawyer members and 80 state and local affiliate organizations with 28,000 lawyer members committed to preserving the Bill of Rights. The American Bar Association recognizes NACDL as an affiliate organization on its House of Delegates. NACDL promotes study and research in the field of criminal law. In furtherance of its objectives over the past decade, NACDL annually files approximately ten *amicus* briefs with this Court on criminal justice and personal privacy issues.

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[1] Pursuant to S.Ct. Rule 37.6, counsel certifies that no counsel for a party authored any part of this brief. No person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief.

Pursuant to S.Ct. Rule 29.6, all four *amici* are nonprofit corporations. None has a parent corporation, and none is a publicly held corporation, nor does a publicly held company own 10% or more of their stock.

The National Organization for the Reform of Marijuana Laws (NORML; www.norml.org) was organized in 1970, and participates in the public policy debate over marijuana policy for the tens of millions of adult Americas who use marijuana responsibly. NORML lobbies for the rights of marijuana users and other taxpayers and voters who oppose current prohibition policies. NORML has thousands of financial supporters from every state. It also has a grassroots political network of more than 18,000 volunteer activists, including 60 state and local affiliated organizations, who oppose the criminal prohibition of marijuana. Accordingly, they also oppose indiscriminate testing of individuals for drugs by the government. NORML has filed *amicus* briefs in this Court on personal privacy issues in drug cases.

The Cato Institute (www.cato.org) is a nonpartisan public policy research foundation dedicated to individual liberty, free markets, and limited constitutional government. To further those ends, Cato Institute scholars have published a number of works discussing the importance of the Bill of Rights, including the constitutional protections against warrantless and unreasonable searches. The instant case raises important questions concerning the power to conduct warrantless and coercive drug tests and is thus of substantial interest to the Cato Institute.

Common Sense for Drug Policy (www.csdp.org) is an educational organization that focuses on providing the public and policy makers with accurate information in an effort to develop more effective drug policies. Common Sense believes that drug abuse should be primarily treated as a public health issue rather than a law enforcement issue.

The parties have consented to the filing of this *amici* brief on behalf of the respondents, and the letter of consent is already filed with the Clerk.

SUMMARY OF THE ARGUMENT

Suspicionless urine testing of non-athlete students "does not fit without the closely guarded category of constitutionally permissible suspicionless searches." *Chandler v. Miller*, 520 U.S. 304, 309 (1997). While *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995), permits drug testing of student athletes, it cannot be read to permit drug testing of all students involved in extracurricular activities because the justifications recognized by this Court in *Vernonia* have no application to these other students.

Individualized suspicion of wrongdoing is normally required before a search may be conducted. "Special needs" may justify dispensing with individualized suspicion in narrowly drawn situations, if the privacy interest is minimal and the means of achieving it serves those ends.

The privacy interest in one's urine is significant. The students here are required to urinate into a cup while a teacher listens outside the stall (girls) or behind them (boys) for sounds of tampering. When it is produced, the teacher feels the cup for temperature of the urine and holds it up to the light to examine it. The student has to produce a list of prescription medications for the testing company to check for false positives. This is all still a significant intrusion.

Students in these extracurricular activities cannot be compared to the student athletes in *Vernonia* to determine whether they have a lesser expectation of privacy. Athletes use communal locker rooms and showers, but the Athletic Team, Band, and Choir do not. Simply by participating in after-school activities, these students cannot be said to have sacrificed their expectation of privacy that society expects and requires and then become subject to random drug testing.

The selection of all students in any extracurricular activity has the vice of being both over- and under-inclusive. The Academic Team is hardly a likely source of students who will be drug abusers. If they were drug abusers, they would not perform well enough to be on the Academic Team in the first place. Because they are not involved in extracurricular activities, the policy exempts students involved in all the science laboratories and any shop activities. A student mixing potentially toxic chemicals, putting an engine in a car, or handling sharp metal or an acetylene torch is more of a threat to him or herself or others if under the influence than someone on the Academic Team.

Reasonableness is the ultimate question in any warrantless search. This testing program is unreasonable because it singles out students for testing who are more likely not to be a threat of being drug abusers and leaves untested those who more logically should be tested. Therefore, this test is not narrowly drawn to satisfy any governmental interest, so it fails under *Vernonia*.

ARGUMENT

SUSPICIONLESS URINE TESTING OF NON-ATHLETE STUDENTS "DOES NOT FIT WITHIN THE CLOSELY GUARDED CATEGORY OF CONSTITUTIONALLY PERMISSIBLE SUSPICIONLESS SEARCHES" AND THUS VIOLATES THE FOURTH AMENDMENT.

This case involves the tension between the liberty of the individual to be free from a suspicionless drug testing search and the petitioner school district's asserted justification of protection of our children from drugs under the "special needs" exception. Both interests are weighty in their own right, but, in the end, after conducting a "context specific" inquiry, the need to protect all school children from drugs cannot overcome the constitutional need for individualized suspicion for a drug test.

The justification for testing of student athletes has no application to testing students in any extracurricular activity the school chooses. Without individualized suspicion, all public school students could ultimately be subjected to drug searches to test their urine, and that is not faithful to our societal understandings of what we expect from our government and the history of the Fourth Amendment.

A. Our historical constitutional heritage is based on and incorporates a right of privacy – "the right to be let alone"

The desire to be free from arbitrary governmental interference into our personal property and our personal

doings was one of the main reasons, as an English Colony, we declared our independence and fought the American Revolution. The full history of the struggle against government-issued writs of assistance to search for smuggled goods or controversial writings has been recounted elsewhere, and it will not be repeated here.[2] Suffice it to say that, by 1765, writs of assistance and general warrants both in England and here created great resentment among the colonists and English subjects. First in *Wilkes v. Wood*, 19 How. St. Tr. 1153, 98 Eng. Rep. 489 (K.B. 1763), and shortly thereafter in *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765), English government officers executing general warrants for unnamed persons and papers were held liable in trespass, and the judgments in those cases were widely circulated and applauded, both there and here for their expressions of limits on the unrestrained powers of government over individual privacy. *See Boyd v. United States*, 116 U.S. 616, 627-28 (1886); *Marcus v. Search Warrant of Property*, 367 U.S. 717, 724-29 (1961).

The abuses of government in the two decades prior to the Declaration of Independence and the American Revolution were obviously still fresh on the drafters' minds when the Constitutional Convention met. When the Constitution was sent to the states and adopted in

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[2] Unrestrained search and seizure was one of the causes of the American Revolution. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES ch. 1-3 (1937), and LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT ch. 1 (1966). The colonial experience with the law of search and seizure is also recounted in 2 LEGAL PAPERS OF JOHN ADAMS 106-47 (1965).

1789, it was only with the understanding that a Bill of Rights would shortly follow. The whole point of the adoption of the Fourth Amendment was to free Americans from a history of seriously ingrained distrust of government officials conducting warrantless and "unreasonable searches." 3 WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602-1791 at 1402-03 (1990).

> This history was, of course, part of the intellectual matrix within which our own constitutional fabric was shaped. The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument of stifling liberty of expression.

Marcus, 367 U.S. at 729.

There is a basic right to privacy in this nation, "the right to be let alone," and it runs throughout our law of individual liberty. Whatever its original, pre-Constitutional source, be it in the common law[3] or the law of torts,[4] government must recognize that certain privacy rights are beyond its reach.

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[3] *See Union Pac. Ry. Co. v. Botsford, infra; Poe v. Ullman*, 367 U.S. 497, 521 & n.12 (1961) (DOUGLAS, J., dissenting) ("The notion of privacy is not drawn from the blue. [n.12: The right 'to be let alone' had many common-law overtones.] It emanates from the totality of the constitutional scheme under which we live.") & 543 (HARLAN, J., dissenting) (in addition, it protects against "arbitrary impositions and purposeless restraints" by government (quoting *Hurtado v. California*, 110 U.S. 516, 632 (1884)).)

[4] *See generally* Warren & Brandeis, *The Right to Privacy*, 4 HARV.L.REV. 193 (1890); Prosser, *Privacy*, 48 CALIF.L.REV. 391

The phrase "the right to be let alone" was first used in a tort case, quoting Judge Cooley's[5] torts treatise, *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 251 (1891), where the railroad sought a physical examination of an injured passenger. This Court affirmed the lower court's refusal to permit the examination of her body so the railroad could separately evaluate the seriousness of her injury:

> No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley: "The right to one's person may be said to be a right of complete immunity; to be let alone." Cooley, Torts, 29.

Union Pac. Ry., 141 U.S. at 251.

The phrase "the right to be let alone" was truly memorialized in Justice BRANDEIS's famous dissent 74 years ago in *Olmstead v. United States*, 277 U.S. 438, 478 (1928):

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found

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(1960); Griswold, *The Right to Be Let Alone*, 55 NW.U.L.REV. 216 (1960).

[5] Cooley was also the author of THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS which was first published in 1868 and went through at least six editions.

> in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the *most comprehensive of rights and the right most valued by civilized men*. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

(emphasis added)

While the "right to be let alone" originally emerged in this Court's cases in a dissent, the existence of a constitutional right "to be let alone" is now well accepted. The Court has repeatedly cited *Olmstead* and considered "the right to be let alone" as a part, not only of the Fourth Amendment,[6] but also the First,[7] Fifth,[8] and Fourteenth[9] Amendments and a general right of privacy.[10]

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[6] *California Bankers Assn. v. Shultz*, 416 U.S. 21, 65 (1974); *Winston v. Lee*, 470 U.S. 753, 758-59 (1985). *See Katz v. United States*, 389 U.S. 347, 350-51 & n.6 (1967).

[7] *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Rowan v. U.S. Post Office Dept.*, 397 U.S. 728, 736 (1970). *See also* note 10, *infra*.

[8] *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966). *See United States v. Morton Salt Co.*, 338 U.S. 632, 651-52 (1950).

[9] *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 n.10 (1972).

[10] *Bartnick v. Vopper*, 121 S.Ct. 1753, 1766 (2001) (BREYER with O'CONNOR, JJ., concurring); *Hill v. Colorado*, 530 U.S. 703, 716-17 (2000) (unwilling listener has a right to avoid "unwanted communication" or "unwelcome speech"; includes right of free passage into an abortion clinic).

Many state and federal courts have used the phrase as well.[11]

The "right to be let alone" is now so substantial and ingrained into the Fourth Amendment that it has been found to outweigh even the weightiest of governmental interests: The interest in procuring evidence to prosecute a violent crime. In *Winston v. Lee*, 470 U.S. 753, 765-66 (1985), the Court denied the government the ability to obtain evidence by forced major surgery on the body of the accused to remove a bullet, even where the search would certainly produce evidence of a violent crime:

> The Fourth Amendment protects "expectations of privacy," see *Katz v. United States*, 389 U.S. 347 (1967) – the individual's legitimate expectations that in certain places and at certain times he has "the right to be let alone – the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (BRANDEIS, J., dissenting). Putting to one side the procedural protections of the warrant requirement, the Fourth Amendment generally protects the "security" of "persons, houses, papers, and effects" against official intrusions up to the point where the community's need for evidence surmounts a specified standard, ordinarily "probable cause." Beyond this point, it is ordinarily justifiable for the community to demand that the individual give up some part of his interest in privacy and security to advance the community's vital interests in law enforcement; such a search is generally "reasonable" in the Amendment's terms.

[11] A Westlaw® search reveals 1,031 cases using the phrase.

But, the Court held that this compelled surgical intrusion for evidence implicated expectations of privacy and personal security to such a degree that the intrusion was constitutionally unreasonable under the Fourth Amendment even though it certainly would produce evidence of a violent crime. *Id.* at 758-59. The government's almost always compelling need to obtain vital evidence to enforce the criminal law and prosecute a violent criminal constitutionally had to give way to the personal dignity of the individual because the magnitude of the search made it "unreasonable" under the Fourth Amendment.

The "right to be let alone," this "most comprehensive of rights and the right most valued by civilized men," is incorporated into our Fourth Amendment jurisprudence, and it prohibits this virtually indiscriminate urine testing program that the petitioners have implemented. Thus, we turn to the Fourth Amendment analysis.

B. The requirement of individualized suspicion vs. special needs in urine testing

> To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing. See *Vernonia*, 515 U.S., at 652-653. But particularized exceptions to the main rule are sometimes based on "special needs, beyond the normal need for law enforcement." *Skinner*, 489 U.S., at 691 (internal quotation marks omitted). When such "special needs" – concerns other than crime detection – are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context specific inquiry, examining

> closely the competing private and public interests advanced by the parties. See *Von Raab*, 489 U.S., at 665-666; see also *id.*, at 668. As *Skinner* stated, "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." 489 U.S., at 624.

Chandler v. Miller, 520 U.S. 304, 313-14 (1997).

This Court has sustained compulsory urine testing under the special needs exception in *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989) (testing of those involved in accidents or who violate certain rules), *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (testing permitted of Customs officers who carried firearms was reasonable; tests of others not reasonable because of no government interest), and *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) (testing permitted of student athletes). It struck down compulsory urine testing in *Chandler* (testing of certain candidates for office unreasonable) and *Ferguson v. City of Charleston*, 121 S.Ct. 1281 (2001) (neonatal urine testing unreasonable where results were shared with law enforcement).

This case involves Tecumseh School's effort to test persons involved in extracurricular activities by extending *Vernonia* beyond its reach. In this "context specific inquiry," *amici* submit that petitioners present no "special needs" for their program. The requirements of *Vernonia*

that permitted suspicionless urine testing of student athletes on a true showing of need are simply nonexistent in this case.

C. *Vernonia* applied

Vernonia gives three factors to test the constitutionality of a drug testing policy: (1) the "nature of the privacy interest upon which the search here at issue intrudes," 515 U.S. at 654; (2) "the character of the intrusion that is complained of," *id.* at 658; and (3) the "nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it," *id.* at 660. Petitioners' argument must fail if it cannot satisfy any one of the three *Vernonia* factors. While the Tenth Circuit found only the third factor weighed heavily in favor of the school children, *amici* submit that the other two factors also weigh in their favor, and this Court should affirm.

1. The "nature of the privacy interest"

The Court of Appeals found that students applying to extracurricular activities had "a somewhat lesser privacy expectation" than other students. *Earls v. Bd. of Education of Tecumseh Public School Dist.*, 242 F.3d 1264, 1276 (10th Cir. 2001). *Amici* disagree with this conclusion because there is indeed a significant privacy interest involved in the act of urination of non-student athletes, notwithstanding the Tenth Circuit's application of *Vernonia*.

There can be no doubt that we all have a reasonable expectation of privacy in our urine, particularly when it is taken from us on demand by government. *Ferguson v. City of Charleston,* 121 S.Ct. at 1287; *Vernonia,* 515 U.S. at 652; *Skinner,* 489 U.S. at 617. In *Von Raab,* 489 U.S. at 617, this Court said:

> Unlike the blood-testing procedure at issue in *Schmerber,* the procedures prescribed by the FRA regulations for collecting and testing urine samples do not entail a surgical intrusion into the body. It is not disputed, however, that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests. As the Court of Appeals for the Fifth Circuit has stated:
>
> > "There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom."
>
> *National Treasury Employees Union v. Von Raab,* 816 F. 2d 170, 175 (CA5 1987). Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously,

> and we agree, that these intrusions must be deemed searches under the Fourth Amendment.

It is also a "seizure." *Id.* at 617 & n.4, citing *United States v. Jacobsen,* 466 U.S. 109, 113 (1984).

The passing of urine into a cup and then handing it over to a school official may be not much more of an invasion of privacy than what a student athlete endures part and parcel of "going out for the team," including "communal undress" and having a preseason physical which includes a urine test. *Vernonia,* 515 U.S. at 657. It is, however, a far greater invasion of privacy to one who does not willingly subject him or herself to such communal activities. How does it remotely follow that one who joins the Academic Team, Band, Choir, or FHA at Tecumseh has voluntarily engaged in a communal activity that lessens his or her expectation of privacy? It does not. It is completely illogical. Petitioners bear the burden of showing a justification, and, to satisfy Fourth Amendment reasonableness, it must be logical and not the strained and tenuous justification they proffer.

Our use of public bathrooms does not lessen our expectation of privacy at all. Unless one is homebound, he or she will have to use bathrooms larger than their bathroom at home when away from home, and other people may be in there, too. While it is true that others in a public bathroom can hear us urinate, they are certainly not listening to make sure we are not seeking to deposit bogus urine in a urinal or toilet. Moreover, they are not trying to force us to urinate on cue into a cup while listening for tampering and then take that urine from us to feel its temperature through the side of the cup then

hold it up to the light to examine its color and converse or make light of it in the process, as happened here.

Even though we do not commonly experience government looking and listening to discern the temperature, quality, and quantity of our excretion, our expectation of privacy in the act of excretion is an "expectation . . . that society is prepared to recognize as 'reasonable.' " *Katz v. United States*, 389 U.S. 347, 361 (1967) (HARLAN, J., concurring). Our "understandings that are recognized and permitted by society"; *Minnesota v. Olson*, 485 U.S. 91, 99-100 (1990), quoting *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978); dictate that the act of urination be and remain private unless there is a compelling governmental need to overcome that privacy.

We may expect our luggage on a bus or airplane will be handled by others who might push it aside or move it, but our societal expectation is that we do not expect it to be handled by a government agent seeking to "search" it by feeling it to discover the contents. *Bond v. United States*, 529 U.S. 334, 338-39 (2000). Similarly, while heat escapes from our home, societal expectations protect us from the police using a thermal imager without a warrant to discover what we are doing inside our own homes. *Kyllo v. United States*, 121 S.Ct. 2038, 2043 (2001).

If our luggage on public transportation is protected, *a fortiori*, why is not the private act of excretion in a public bathroom? *Amici* submit that *Bond* requires that petitioners' position be rejected under the first *Vernonia* factor. To state, without reasoned analysis, that non-athletes have no reasonable expectation of privacy in their act of urination because of their participation in group activities

distorts both reality and the basis of *Vernonia* beyond all its limits. How is it that any group activity of the Academic Team, Band, Choir, and FHA somehow makes the act of urination no longer private? On a road trip they still use the bathroom alone, unlike the athletes with their communal locker rooms and showers.

Students cannot have reasonably been said to have sacrificed their privacy to that degree by attending public school. The nature of petitioners' argument is that if the Court approves Tecumseh's urine testing program, it will be expanded to all students in any extracurricular activity, just as some commentators have sought,[12] and then to all students, as others have sought.[13] Such end results are neither acceptable nor reasonable under Fourth Amendment reasonableness and *Vernonia*.

School children are required by the law in every state to attend school through a certain minimum age. Higher education is, however, a privilege, and entry into one's school of choice is often highly-competitive, requiring more than just good grades. Accordingly, many students must engage in extracurricular activities to get into the

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[12] James M. McCray, *Urine Trouble! Extending Constitutionality to Mandatory Suspicionless Drug Testing of Students in Extracurricular Activities*, 53 VAND. L. REV. 387, 426 (2000); Ralph D. Mawdsley & Charles J. Russo, *Random Drug Testing and Extracurricular Activities*, 159 EDUC. L. REP. 1, 15 (2002).

[13] *See* Joanna Raby, *Reclaiming Our Public Schools: A Proposal for School-Wide Testing*, 21 CARDOZO L. REV. 999, 1024-28 (1999) (*Vernonia* supports school-wide urine testing).

college they want,[14] as did Miss Earls getting into Dartmouth. If students in virtually any extracurricular activity may be drug tested, the school effectively only drug tests the college-bound; *i.e.*, the mediocre and unambitious students, the slackers (those supposedly most at risk to use drugs), would be the only ones exempt from such a search. That is a curious result: Tecumseh penalizes excellence by drug testing those who desire to better themselves and immunizes those students who have no ambition and no desire to go to a non-state supported college. Students need only avoid extracurricular activities to avoid detection as a drug user, and they would get neither drug education nor treatment. Thus, it is reasonableness turned inside out and stood on its head. What is worse, it explains itself as bad policy.

2. "Character of the intrusion" is significant

The Court of Appeals found the character of the intrusion is no different here than in *Vernonia*, 515 U.S. at 660: "the invasion of privacy is not significant." 242 F.3d at 1276.

Amici submit that this, too, is incorrect. As stated above, the invasion of privacy contemplated here is more significant and embarrassing than the student athletes in *Vernonia*. Add to it the fact that students are summoned from class for testing rather than tested during their

[14] *Trinidad School Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1109 (Colo.1998), quoted by the Court of Appeals below, 242 F.2d at 1276.

normal athletic training amongst each other, and attention is called to the fact they are being tested. They are stigmatized by being called out because being singled out by the school is an anathema to many teenagers. This is no small matter; they have "a right to be let alone" unless the government can show a weighty justification.

3. "Nature and immediacy of the governmental concern . . . and the efficacy of this means for meeting it"

The Court of Appeals found on this factor that the Tecumseh drug testing policy failed to satisfy *Vernonia*, and it held the Tecumseh policy failed. 242 F.3d at 1276-79. This is correct for multiple reasons beyond what respondents will argue:

a. The "drug problem" at Tecumseh is virtually non-existent

One critical basis for the holding in *Vernonia* was the trial court's finding that an "epidemic" of drug abuse existed there and there was "rebellion" "particularly [of] those involved in interscholastic athletics." *Id.* at 662-63. This case, however, involves a school district with virtually no drug problem before the testing program was adopted. To the date of the summary judgment, only 3 students of 500 over the testing years (nearly 800 students in school every year) had tested positive: 0.6% of those tested. That is hardly the "epidemic" found in *Vernonia*. Rather, this situation is more like the "lack of a concrete danger" found in *Chandler v. Miller*, 520 U.S. at 319.

Real numbers would "shore up an assertion of special need for a suspicionless search program." *Id.* Here, there are no real numbers. Tecumseh has the good fortune to have virtually no drug problem, but they want to create one to justify their drug testing program and as a mere symbol to the school district's commitment to drug-free after school activities. That alone should make it constitutionally suspect under *Chandler*.

b. The testing program here is both over- and under-inclusive

At what point is there a "drug problem" under *Vernonia*? What percentage of those who have *ever* used drugs versus those who are currently using drugs is relevant? And what percentage is permissible and over what span of years? 5%? 1%? 0.6%? 0.01%? At what point do the indiscretions of few, a number so small that can be counted on one hand out of the nearly 1500 students[15] that must have passed through Tecumseh during this program, justify government's ability to drug test practically everybody? *Id.* Because a small number of the general population commit crime, government has no power to treat all of us as criminals and search us for crime prevention; *see City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (general roadblocks unconstitutional); or to seek to prove us guilty by fingerprinting without individualized suspicion. *Davis v. Mississippi*, 394 U.S. 721

[15] And, if that many students passed through, three positive tests is 0.2% of the whole number.

(1969) (dragnet for fingerprints unconstitutional). But, that is what this drug testing program really is.

The selection of students to be drug tested is both over- and under-inclusive and deprives the testing program of any opportunity to truly serve the school district's true interests in combating (future) drug abuse in students. Accordingly, it fails to satisfy Fourth Amendment reasonableness.

Tecumseh requires non-athletes involved in the Academic Team, Band, Choir, Show Choir, Color Guard, Future Farmers of America (FFA), and Future Homemakers of America (FHA) to submit to drug testing as a condition of participation for safety reasons.[16] It does not, however, require students involved in laboratory classes in chemistry, biology, or physics be tested, nor does it require testing of students in shop classes or driver education. The school board was concerned about the dangers to students having to handle and wrestle large animals while under the influence, but it expresses no concern with students having to handle and wrestle with, for example, saws and drills, an acetylene torch to weld or cut metal, red hot or sharp metals, an automobile engine being installed in a car or a car being placed on jacks for repair, wielding a scalpel in biology or handling acid in chemistry, or learning to drive a car with no experience. We must conclude that because Tecumseh decided to test students in extracurricular activities, the school board felt that testing those in extracurricular

[16] How the Academic Team, Choir, or FHA are at risk of injury will never be explained.

activities would be approved by the courts after *Vernonia*.[17]

Amici submit that drug testing the Academic Team is counterintuitive. If student drug usage is so insidious and destructive that it causes students to have lower grades and poor performance, then drug usage by members of the Academic Team would readily show up in their performance and they would be dropped from the team. Every reason petitioners cite concerning deficient academic performance by drug users excludes the Academic Team *by definition* from any need to be drug tested. Thus, the Academic Team is tested, but apparently only for Vernonian cover because application to *any* extracurricular activity triggers drug testing under this policy.

Just because some people drive drunk, government does not have the power to stop every car to look for drunk drivers. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 454 (1990), quoting *Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (traffic stop to look at driver's license was unconstitutional; " 'standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.' "). A drunk driver on the streets, however, is a far greater threat to others than a student who might have done drugs at some undefined time in the past who tests positive but is not under the influence. One can see a drunk driver by the way he drives, and that gives officers

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[17] *See* McCray, note 12, *supra* (*Vernonia* permits drug testing of anyone involved in any extracurricular activities).

individualized suspicion to stop the vehicle for further investigation. That is individualized suspicion by definition. Tecumseh tests a large group of students with no suspicion or legal justification whatsoever.

Under *Chandler*'s "context specific inquiry," the policy here fails to include others who are more of a risk to themselves or others if under the influence of mind-altering substances at school. And, at the same time, the policy includes those who could not be under the influence or they would not possibly be in the covered group (*e.g.*, the Academic Team). The third factor of *Vernonia*, 515 U.S. at 606, the "nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it," must consider the overbreadth of this program. Therefore, the program is constitutionally unreasonable because of its sweep alone.

c. This testing program is not swift enough to justify dispensing with individualized suspicion under *T.L.O.*

One premise of applying the "special needs" exception to students in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), is that a warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *Id.*, 469 U.S. at 340. This urine testing program is not swift – the urine sample is sent to a drug laboratory in Tulsa for testing, and it is tested differently a second time if it tests positive. J.A.70. An officer may require an hour or two to get a warrant, but it presumably takes one business day for the mail to go between Tecumseh and Tulsa, a little

over 100 miles. Therefore, if the test is performed upon the sample immediately upon receipt and the results are mailed back from the lab, the results would not be revealed for a minimum of two days – hardly the kind of swift response contemplated by *T.L.O. See Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987).

d. This drug testing program sets a poor example for the students

The Tecumseh testing program creates a poor example for the students. When a testing program is enforced against so many people without individualized suspicion, they learn that individual liberty is meaningless. Students also see this testing program as largely symbolic, and the school district loses credibility. "For good or for ill, [our Government] teaches the whole people by its example." *Olmstead*, 277 U.S. at 485.

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Id. at 479, quoted in *Von Raab*, 489 U.S. at 687 (SCALIA, J., dissenting).

> Those who lose because of the lack of understanding that begot the present exercise in symbolism are not just the Customs Service employees, whose dignity is thus offended, but all of us – who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content, and who become subject to the administration of federal officials whose respect for our privacy can hardly be greater than the small respect they have been taught to have for their own.

Von Raab, 489 U.S. at 698 (SCALIA, J., dissenting).

D. Reasonableness – the ultimate question in any warrantless search

The ultimate Fourth Amendment question, as always, is "reasonableness."

> [T]he Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. . . . What is reasonable, of course, "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." . . . Thus, the permissibility of a particular practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."

Skinner, 489 U.S. at 618, quoting *Prouse*, 440 U.S. at 654, quoted in *Vernonia*, 515 U.S. at 652. This Court has long held that the "fundamental inquiry in considering Fourth Amendment issues is whether or not a search or seizure is reasonable under all the circumstances." *United States v. Chadwick*, 433 U.S. 1, 9 (1977).[18]

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[18] *Accord: Griffin v. Wisconsin*, 483 U.S. at 873; *O'Connor v. Ortega*, 480 U.S. 709, 719 (1987); *Donovan v. Dewey*, 452 U.S. 594, 602 (1981); *Delaware v. Prouse*, 440 U.S. at 653-54.

Amici submit that the testing program employed by Tecumseh does not "fit within the closely guarded category of constitutionally permissible suspicionless searches" (*Chandler*, 520 U.S. at 309) because the testing program is both over- and under-inclusive. It is not narrowly drawn with a view toward limiting the number of students subject to testing to those who truly require it.[19] As the Court of Appeals pointed out, if it permitted this drug test, "schools could test all of their students simply as a condition of attending school." 242 F.3d at 1278.

That is what school districts want, but this form of suspicionless and standardless testing does not satisfy the "special needs" exception for warrantless searches of the person. Therefore, it is unreasonable under the Fourth Amendment.

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[19] *Amici* do not agree that suspicionless urine testing of high school students is constitutional. Nevertheless, we are governed by *Vernonia*, so we operate within its holding.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 6 2002
CLERK

No. 01-332

IN THE
SUPREME COURT OF THE UNITED STATES

BOARD OF EDUCATION OF
INDEPENDENT SCHOOL DISTRICT NO. 92
OF POTTAWATOMIE COUNTY AND INDEPENDENT SCHOOL
DISTRICT NO. 92 OF POTTAWATOMIE COUNTY,
Petitioners,

v.

LINDSAY EARLS AND LACEY EARLS, MINORS, BY THEIR
NEXT FRIENDS AND PARENTS, JOHN DAVID AND LORI EARLS,
AND DANIEL JAMES, A MINOR, BY HIS NEXT FRIEND AND
MOTHER, LETA HAGAR,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. THE TENTH CIRCUIT PROPERLY FOUND THAT A SCHOOL DRUG-TESTING POLICY, THE PURPOSE OF WHICH IS NOT TO SAFEGUARD THE PHYSICAL HEALTH AND SAFETY OF STUDENTS BUT TO SERVE A GENERALIZED DESIRE TO COMBAT A PERCEIVED DRUG PROBLEM, IT NOT "JUSTIFIED AT ITS INCEPTION" AND HENCE IS CONSTITUTIONALLY INVALID 6

II. THE TENTH CIRCUIT PROPERLY CONCLUDED THAT A SCHOOL DRUG TESTING POLICY THAT DOES NOT EMPLOY AN INDIVIDUALIZED "REASONABLE SUSPICION" STANDARD TO TEST STUDENTS IN THE GENERAL STUDENT BODY POPULATION IS NOT "REASONABLE IN SCOPE" 12

III. ABSENT INDIVIDUALIZED REASONABLE SUSPICION, PETITIONERS' STUDENT DRUG TESTING POLICY UNACCEPTABLY INTRUDES UPON THE RIGHT OF PARENTS TO DIRECT AND CONTROL THEIR CHILDRENS' EDUCATIONAL CHOICES AND MEDICAL TREATMENT 16

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

19 Solid Waste Dept. Mechanics v. City of Albuquerque, 156 F.3d 1068 (10th Cir. 1998) 8, 9

Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982) 14

Brown v. Texas, 443 U.S. 47 (1979) 5

Camera v. Municipal Court, 387 U.S. 523 (1967) ... 14

Chandler v. Miller, 520 U.S. 305 (1997) 6, 7, 17

Delaware v. Prouse, 440 U.S. 648 (1979) 15

Earls v. Pottawatomie Indep. Sch. Dist., 242 F.3d 1269 (10th Cir. 2001). 8, 9, 19

Elrod v. Burns, 427 U.S. 347 (1976) 17

Falvo v. Owasso Independent School District No. I-011, 229 F.3d 965 (10th Cir. 2000), *cert. granted*, 121 S.Ct. 2547 (2001) 4

FCC v. League of Women Voters, 468 U.S. 364 (1984) 17

Ferguson v. City of Charleston, 121 S.Ct. 1281 (2001) 5-7, 17

Florida v. Royer, 460 U.S. 491 (1983) 12

Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) 18

Good News Club v. Milford School District, 533 U.S. 98 (2001) 1

Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) 17

Illinois v. Wardlow, 528 U.S. 119 (2000) 15

Indianapolis v. Edmond, 531 U.S. 32 (2000) 6-8, 15

Lassiter v. Dept. of Soc. Serv., 452 U.S. 18 (1981) .. 18

Lee v. Weisman, 505 U.S. 577 (1992) 16-17

Meyer v. Nebraska, 262 U.S. 390 (1923) 16

Michael H. v. Gerald D., 419 U.S. 110 (1989) 18

Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) 8

National Treasury Employees' Union v. Von Raab, 489 U.S. 656 (1989) 8, 15, 17

New Jersey v. T.L.O., 469 U.S. 325 (1985) 5-7, 15

O'Connor v. Ortega, 480 U.S. 709 (1987) 5

Owasso Indep. School Dist. v. Falvo, Sup. Ct. No. 00-1073 (October 2001 session) 1

Pickering v. Board of Educ., 391 U.S. 563 (1968) .. 17

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 16

Santa Fe Indep. School Dist. v. Doe, 530 U.S. 290 (2000) 14

Santosky v. Kramer, 455 U.S. 745 (1982) 18

Sherbert v. Verner, 374 U.S. 398 (1963) 17

Skinner v. Oklahoma, 316 U.S. 535 (1942) 16

Skinner v. Railway Labor Executives' Assn., 489 U.S. 602 (1989) 4, 5, 8, 15, 17

Smith v. Org. of Foster Families, 431 U.S. 816 (1977) 18

Speiser v. Randall, 357 U.S. 513 (1958) 17

Tarka v. Cunningham, 917 F.2d 890 (5th Cir. 1990) .. 4

Terry v. Ohio, 392 U.S. 1 (1968) 5, 12, 15, 16

Thomas v. Review Bd. of the Ind. Unemployment Sec. Div., 450 U.S. 707 (1981) 17

United States v. Brignoni-Ponce, 422 U.S. 873 (1975)

. 12

United States v. Calandra, 414 U.S. 338 (1974) 7

United States v. Leon, 468 U.S. 897 (1984) 7

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 8, 14

United States v. Mendenhall, 446 U.S. 554 (1980) . . 12

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) 7

Vernonia School District v. Acton, 515 U.S. 646 (1995) . . . . . *passim*

Warden v. Hayden, 387 U.S. 294 (1967) 12

West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943) 14

Whren v. United States, 517 U.S. 806 (1996) 15

CONSTITUTIONAL AND STATUTORY AUTHORITY

UNITED STATES CONST., AMEND. IV . . . . . *passim*

Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2001) 4

MISCELLANEOUS AUTHORITY

Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415 (1989) 17

INTEREST OF *AMICUS CURIAE*[1]

This case presents the extremely important question of whether there exist constitutional limits on public school districts that seek to monitor their students' illicit drug activity by imposing mass suspicionless urinalysis drug testing upon substantial portions of the student body population, including students who are not engaged in athletics or other physically hazardous activities.

The Rutherford Institute is a non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Rutherford Institute litigates and educates on behalf of constitutional rights, civil liberties and human rights. Attorneys affiliated with the Institute have filed petitions for writs of certiorari and *amicus curiae* briefs in many cases in the Supreme Court, and have represented parties on the merits in several cases, including cases involving the constitutional and civil rights of public schoolchildren. *Good News Club v. Milford School District*, 533 U.S. 98 (2001); *Owasso Indep. School Dist. v. Falvo*, Sup. Ct. No. 00-1073 (October 2001 session).

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[1] Counsel of record to the parties in this case have consented to the filing of all *amicus curiae* briefs on behalf of Respondents, pursuant to a blanket consent filed with the Court on January 29, 2002. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Amicus respectfully submits that Petitioners' mandatory drug testing policy is unconstitutional because it is unreasonable both at inception and in scope. No legitimate "special need" justifies the program, and the program goes well beyond the scope of reasonableness by imposing mass, suspicionless testing on students who are not at particularized physical risk from drug abuse. Further, the program unacceptably infringes upon parental liberty interests to direct and control educational and medical decisions.

ARGUMENT

Like a majority of students in Pottawatomie County schools, most students in the United States are involved in an extracurricular activity, whether it is band, chess club, theater and drama, student government, athletics, cheerleading, prayer groups, French or Spanish club, community service, newspaper, yearbook, music lessons or computer club. If all such students are potentially subject to random urinalysis drug-testing without individualized reasonable suspicion and without any further showing of a special law enforcement or institutional need, then surely there is nothing to stop a school from simply drug-testing *all* of its students. After all, Petitioners have offered no reason to believe that students involved in extracurricular activities are more likely to be involved in drug use than other students. Intuitively, it would seem the opposite: the more students are engaged in the extracurricular life of the school, the less time and inclination they will have to get caught up in drug use. But if 18 million students, grades 7 through 12,[2] can be tested

[2] *See Vernonia School District v. Acton*, 515 U.S. 646, 666 (1995) (O'Connor, J. dissenting). See also Brief of Respondents at 6, n. 5 (citing federal data reflecting 23.7M students in grades 6-12).

without any suspicion they are using drugs, it seems clear that students have indeed shed their Fourth Amendment rights at the school house gate.

Petitioners' Drug Testing Policy.

The Court's *amicus* suggests that it is important to bear in mind in considering this case that Petitioners do not seek to justify their drug testing program as primarily a random selection program. Pursuant to the policy, all extra-curricular students are tested upon initiating participation in a listed extra-curricular activity. Brief of Petitioners ("Pet. Br.") at 9. Students are also subjected to testing if chosen by random sample, and if a "reasonable suspicion" provides a basis for testing. Pet. Br. at 9-10.

Students who wish to participate in the specified extra-curricular activities are potentially subjected to three types of testing: 1) a preliminary drug test required of *all* students who participate (conducted, notably, not by a student's personal physician, but by school officials in the same manner as a random drug test, *see infra*); 2) a random selection drug test that subjected a substantial number of participating students to testing; and 3) a drug test imposed "at any time when there is reasonable suspicion[3]

[3] See J.A. at 151-52, noting that approximately 500 students had undergone either inital or random testing in a two-year period. Petitioner's policy defines "reasonable suspicion" as

> a suspicion of illegal or performance-enhancing drug use based on specific observations made by coaches/administrators/sponsors of the appearance, speech,

to test for illegal or performance-enhancing drugs." J.A. at 197.[4]

Requirements for a Constitutional Search.

The Supreme Court has held that the taking of a urine sample and testing of the sample by urinalysis is unquestionably a "search" within the meaning of the Fourth Amendment. *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 617 (1989); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995).[5]

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or behavior of an activity student; the reasonable inferences that are drawn from those observations; and/or information of illegal or performance-enhancing drug use by an activity student supplied to school officials by other students, staff members, or patrons.

J.A. at 196.

[4] Additionally, it is worth noting that while it may be that the policy mandates that drug testing results be placed "in confidential files separate from the students' other educational files," 242 F.3d at 1268, from there to be disclosed "only to those school personnel who have a need to know" and not to law enforcement authorities, this aspect of the policy cannot shield disclosure of the results from third party law enforcement authorities pursuant to the provisions of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2001) (as amended by P.L. 107-56, Title V, § 507, new subsection 1232g(j)). *See Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990); *Falvo v. Owasso Independent School District No. I-011*, 229 F.3d 965 (10th Cir. 2000), *cert. granted*, 121 S.Ct. 2547 (2001). The results remain "educational records" within the meaning of FERPA, and subject to disclosure upon court order. 20 U.S.C. § 1232g(j).

[5] "It is not disputed ... that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee,

Ordinarily, "in the absence of any basis for suspecting [an accused] of misconduct, the balance between the public interest and [an accused's] right to personal security and privacy tilts in favor of freedom from police interference." *Brown v. Texas*, 443 U.S. 47, 52 (1979). In view of this principle, the Supreme Court in a variety of Fourth Amendment contexts, ranging from *Terry* stops to "special needs" searches and school searches, has stressed that intrusions on the constitutionally protected right of privacy "should be judged by the standard of reasonableness under all the circumstances." *O'Connor v. Ortega*, 480 U.S. 709, 725-726 (1987). This standard has two parts: 1) Whether the search was "justified at its inception *based upon reasonable, individualized grounds* for suspecting the search will turn up evidence of misconduct," 480 U.S. at 726 (emphasis added), citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968); and 2) Whether the search was "reasonably related in scope to the circumstances which justified the interference in the first place," 480 U.S. at 726, citing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). *Amicus* believes Petitioners' suspicionless drug testing policy is unreasonable both at inception and in scope, and unacceptably infringes upon parental liberty interests to control educational and medical decisions.

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including whether he or she is epileptic, pregnant, or diabetic." *Skinner*, 489 U.S. at 618. In assessing the constitutional validity of such drug testing programs, the Court has not differentiated the initial taking of the urine sample as an independent "seizure," but rather treats it as a component of the Fourth Amendment search. *Skinner*, 489 U.S. at 618 ("In view of our conclusion that the collection and subsequent analysis of the requisite biological samples must be deemed Fourth Amendment searches, we need not characterize the employer's antecedent interference with the employee's freedom of movement as an independent Fourth Amendment seizure"); *Ferguson v. City of Charleston*, 121 S.Ct. 1281 (2001).

I. THE TENTH CIRCUIT PROPERLY FOUND THAT A SCHOOL DRUG-TESTING POLICY, THE PURPOSE OF WHICH IS NOT TO SAFEGUARD THE PHYSICAL HEALTH AND SAFETY OF STUDENTS BUT TO SERVE A GENERALIZED DESIRE TO COMBAT A PERCEIVED DRUG PROBLEM, IT NOT "JUSTIFIED AT ITS INCEPTION" AND HENCE IS CONSTITUTIONALLY INVALID.

Without question, as the Court noted in *Vernonia School Dist. 47J v. Acton*, *supra*, in certain circumstances, "special needs" justify dispensing with the warrant and probable cause requirement of the Fourth Amendment. 515 U.S. at 574, citing *New Jersey v. T.L.O.*, 469 U.S. 325. However, neither the application of the "special needs" doctrine nor the standard of "reasonable suspicion" enunciated in *T.L.O.* was expressly held by the Court to be applied wholesale to all searches in public schools; rather, as the Court subsequently clarified in *Chandler v. Miller*, 520 U.S. 305 (1997), *Indianapolis v. Edmond*, 531 U.S. 32 (2000), and *Ferguson v. City of Charleston*, 121 S.Ct. 1281 (2001), the application of the "special needs" doctrine must be applied on a program-by-program basis.

The Supreme Court has typically scrutinized Fourth Amendment searches imposed on a programmatic basis more closely than searches conducted by officers or officials in the field pursuant to their properly delegated authority. "Blanket searches, because they can involve 'thousands or millions' of searches, 'pose a greater threat to liberty' than do suspicion-based ones, which 'affect one person at a time.'" *Vernonia*, 515 U.S. at 667 (O'Connor, J., dissenting). This is appropriate in light of the Court's recurring observation that the Fourth Amendment

"functions differently" from other constitutional protections in the criminal justice process; it prohibits unreasonable searches or seizures whether or not the evidence is ever used in a criminal proceeding, and a violation of the Amendment is "fully accomplished" at the time of the unreasonable governmental intrusion. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990), quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974); *United States v. Leon*, 468 U.S. 897, 906 (1984). *T.L.O.* was an example of the latter type of suspicion-based search case, standing for the principle that individual searches by school officials on a "reasonable suspicion" basis to investigate breaches of school disciplinary rules are not "unreasonable" searches in contravention of the Fourth Amendment. 469 U.S. at 341. However, later authority has affirmed that an analysis of whether "special needs" exist to justify a search is appropriate in cases that assess the constitutionality of such programs. "Our cases dealing with intrusions that occur pursuant to a general scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level." *Edmond*, 121 S.Ct. at 457. The Court explained in *Edmond*:

> While "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis," programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion.

Id. The Court added further clarity to this matter in *Ferguson*:

> In *Chandler*... we did not simply accept the State's invocation of a "special need." Instead, we carried out a "close review" of the scheme at issue before concluding

> that the need in question was not "special," as that term has been defined in our cases. In this case, a review of the [drug testing] policy plainly reveals that the purpose actually served by the [hospital's] searches "is ultimately indistinguishable from the general interest in crime control."

121 S.Ct. at 1290, quoting *Indianapolis v. Edmond*, 121 S.Ct. at 458. The Court expressly distinguished search cases that turned on a case-by-case balancing test based on "reasonableness." 121 S.Ct. at 1291, n. 21, distinguishing *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 455 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). One key basis for distinguishing those cases was that they did not involve "the intrusive search of the body." *Id. Accord Edmond*, 121 S.Ct. at 461 (Rehnquist, C. J., dissenting). Likewise, in *Edmond,* the Court reviewed the state's purpose for the roadblock program, and found that it did not constitute a "special need." 121 S.Ct. at 458 ("we decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control").

The Tenth Circuit appropriately recognized this two-step analysis as articulated in controlling authority in that Circuit, *19 Solid Waste Dept. Mechanics v. City of Albuquerque*, 156 F.3d 1068 (10th Cir. 1998), in which the Court of Appeals correctly observed that the Supreme Court in *Chandler* "added a step to the analysis [of] *Skinner*, *[National Treasury Employees' Union v.] Von Raab* [489 U.S. 656 (1989)], and [*Vernonia*]." 156 F.3d at 1072; *Earls*, 242 F.3d 1269. That step "requires courts to inquire first into whether the government has established the existence of a special need before proceeding to any balancing of government and private interests." 242 F.3d at 1269. This "two-fold inquiry" is first, whether the proffered governmental concerns were "real;"

and second, whether the program "met the related goals of detection and deterrence." *Id.* Applying this test, the Tenth Circuit held that no "special need" existed to justify the random drug testing of city employees at issue in *19 Solid Waste Mechanics*. 156 F.3d at 1074-75. The court thus declined to proceed to the next step of the "special needs" analysis, the balancing of governmental and private interests. *Id.* While the court in *Earls* noted the two-step analysis in *Solid Waste Mechanics*, it felt it was bound by the Supreme Court's decision in *Vernonia* that the "special needs" doctrine applied to random drug testing in public schools, and hence applied the "reasonableness" test to invalidate the program. 242 F.3d at 1270.

Applying the "special needs" analysis to the Petitioners' drug testing policy, it is clear from the record below that Petitioners could not demonstrate that any hard evidence of drug usage existed before the policy was put into place. The main proponent of the policy, Dean Rogers, repeatedly testified that the primary purpose of the policy was not to ensure the safety of extra-curricular participants, but to safeguard the reputation of the school district:

> Q. ....If the Tecumseh High School Math Club members wanted to compete to see who could do the calculations the fastest, would that make them subject to this drug testing policy?
>
> A. No, because they're not in competition with other schools.
>
> * * * *
>
> .... They're just being competitive among theirselves [sic]. They're not going out into the community and representing Tecumseh school per se as a Math Club that is going to a competition.

A. Okay. So the key to understanding who is included under this drug testing policy is that it is students who represent the school in competitions with other schools?
A. Yes.

J.A. at 73-74 (excerpt of deposition of Dean Rogers, pp. 40-41).

For example, Rogers testified regarding band members who are subject to the policy:

Q. .... You're not saying that there is any danger of [band members] seriously injuring themselves or other people; that's not a reason for this drug testing policy for the band, is it?
A. No.

J.A. at 77 (Rogers deposition, p. 47). Rogers testified that drug-related incidents that might prove "embarrassing" to the school as a whole provided the rationale for subjecting band members to the testing policy. *Id.* at 78 (Rogers deposition, pp. 47-48). The same rationale applied to the school's vocal group, Rogers testified:

A. .... not keeping up with the place they are supposed to be and things like that. That could possibly eliminate them from competition. you know, where they wouldn't present theirself [sic] well and things like that.

J.A. at 79 (Rogers deposition, p. 49). While Dean Rogers did point to the risk that a performer could fall off the stage, J.A. at 78 (Rogers deposition, p. 48), she acknowledged that this danger was combined with the concern that a vocal student would not

represent Tecumseh well. J.A. at 79 (Rogers deposition, pp. 49-50).

Dean Rogers readily admitted that the academic team would not be subjected to increased physical danger in performances because of drug use:

A. Academic team, I don't know that it would be physical. They're competing, but they have to present theirself [sic] well to us and to, you know, whoever they're competing with.
Q. Okay.
A. But as far as the physical they shouldn't unless they fall down or something like that. They shouldn't be really physical unless they're horseplaying, you know what I mean.

* * * *

And I feel like whether it is physical or nonphysical since athletes and all of those have to be, I think it's only fair that they be tested, too.
Q. And there's not any element of physical danger there, is there?
A. No.

* * * *

Q. It's simply that, in your opinion, the students who represent the school in competition need to put forth their best effort and best represent the school and that drugs might interfere with that; is that right?
A. Correct.

J.A. at 82-83 (Rogers deposition, pp. 63, 67). Based upon the record before the Court, it cannot be said that the purpose of the

program is a constitutionally cognizable one, such as student health, safety or discipline. Consequently, the program fails the first prong of the two-part "special needs" analysis: it was not "justified at its inception," and the Tenth Circuit therefore correctly reversed the District Court.

II. The Tenth Circuit Properly Concluded that a School Drug Testing Policy that Does Not Employ an Individualized "Reasonable Suspicion" Standard to Test Students in the General Student Body Population is Not "Reasonable in Scope."

The majority in *Vernonia* expressed resistance to a requirement that schools demonstrate that a "less intrusive means to the same end" was available, namely, "drug testing on suspicion of drug use." 515 U.S. at 663 ("We have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment"). The majority's rather offhanded dismissal of the argument that suspicion-based drug testing was a "less intrusive means" to the same end is not consistent with statements in many of the Court's other "special needs" cases, and appears to flout the central rule of *Terry* stop jurisprudence (the progenitor of the "special needs" exception) that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry*, 392 U.S. at 19 (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967)). *See also United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Mendenhall*, 446 U.S. 554 (1980); *Florida v. Royer*, 460 U.S. 491, 500 (1983) (the investigative methods employed pursuant to a *Terry* stop "should be the least intrusive means reasonably available to verify or dispel the officer's

suspicion in a short period of time"). "The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all." *Terry*, 392 U.S. at 28.

The majority's further rationales for rejecting a "less restrictive means" analysis, practicality and a fear of arbitrary enforcement, are also puzzling:

> Respondents' alternative entails substantial difficulties – if it is indeed practicable at all. It may be impracticable, for one thing, simply because the parents who are willing to accept random drug testing for athletes are not willing to accept accusatory drug testing for all students, which transforms the process into a badge of shame. Respondents' proposal brings the risk that teachers will impose testing arbitrarily upon troublesome but not drug-likely students.

As to the first rationale, it is no answer to suggest that majoritarian pressures pose an impediment to the imposition of a drug testing program. In fact, in the instant case, "[n]o one who attended that meeting [the school board meeting at which the proposed drug testing policy was discussed] was reported to have objected to suspicionless drug-testing of school children." Brief of the United States in Support of Petitioners at 5, citing C.A. App. 78. (*But see Amicus* Br. of 19 Parents and Grandparents of Current and Former Pottawatomie Sch. Dist. Students (opposing program). Assuming, *arguendo*, that parents in the Pottawatomie community wished to impose a suspicion-based drug testing program, there is simply no support for the proposition that political considerations presented a hurdle. Moreover, Petitioners note that

the Court has displayed a "sensitivity" to educators *because of their responsiveness to parental accountability.* Brief for Petitioners at 16, citing *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 891 (1982) (Burger, C.J., dissenting) ("In most public schools in the United States the parents have a large voice in running the school. Through participation in the election of school board members, the parents influence, if not control, the direction of their children's education. A school board is not a giant bureaucracy far removed from accountability for its actions; it is truly 'of the people and by the people.'"). This is simply another way of stating that school boards and officials are subject to majoritarian pressures. *Cf. Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 305 (2000) (neither school district's adoption of "solemnization" policy nor student elections for "solemnizer" saved constitutionality of policy permitting student prayer before athletic events). However, "[Fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Id.*, quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943). Neither the facility nor the difficulty associated with imposing a suspicion-based drug testing policy through elected representatives has anything to do with the constitutionality of such a regime.

Further, the potential "arbitrary" application of a suspicion-based policy turns the doctrine of "special needs" searches on its head. It is certainly true that no irreducible requirement of individualized suspicion is imposed by the Fourth Amendment in all circumstances. *United States v. Martinez-Fuerte*, 428 U.S. at 560-561, *Camera v. Municipal Court*, 387 U.S. 523 (1967). However, "*exceptions to the requirement of individualized suspicion* are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other

safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field."'" *T.L.O.*, 469 U.S. at 342, quoting *Delaware v. Prouse*, 440 U.S. 648, 654-655 (1979) (citations omitted; emphasis added); *Indianapolis v. Edmond*, *supra*. In other words, the Court has looked to the propensity of the search to be abused as a factor in considering the constitutionality of a *non-individualized* search, not to call into question suspicion-based searches. Generally, the requirement of a finding of "reasonable suspicion" based upon "articulable facts" is said to fulfill the function of serving as a bulwark against arbitrary enforcement and abuse. *See Terry v. Ohio, supra*; *Whren v. United States*, 517 U.S. 806 (1996); *Illinois v. Wardlow*, 528 U.S. 119 (2000).

Petitioners have acknowledged engaging in virtually continuous monitoring of student activities on the campus, employing cameras and monitors in the hallways and "sniff" searches by drug canines. Now the District, fearful that these extreme intrusions within the halls, classrooms and locker rooms of the District's campuses are insufficient to prevent covert drug activity *off campus*, wants the power to take the final step and monitor the students' blood streams for illegal substances. But it cannot be gainsaid that there is no "drug exception" to the Fourth Amendment. *Skinner v. Railway Labor Executives' Assoc*, 489 U.S. at 641 (Marshall, J., dissenting). If the decision of the Tenth Circuit is reversed, this Court will have sanctioned just such a "drug exception" to the rule of reasonable suspicion articulated in *T.L.O.* The Pottawatomie School District, having extended its drug policy to the last full measure of intrusiveness in furtherance of a questionable purpose – saving itself from "embarrassment" by its own students – and based largely upon hearsay anecdotal reports of "widespread drug use," will have been rewarded by this Court with the authority to

impose a solution that maximizes intrusion on student privacy.

III. Absent Individualized Reasonable Suspicion, Petitioners' Student Drug Testing Policy Unacceptably Intrudes Upon the Right of Parents to Direct and Control their Childrens' Educational Choices and Medical Treatment.

The guarantee of personal privacy within Respondents' families and in their children's bodies has long been recognized in a plethora of cases such as *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Skinner v. Oklahoma*, 316 U.S. 535, 541-542 (1942); and *Pierce v. Society of Sisters*, 268 U.S. 510 at 535 (1925). Both before and after birth, parents possess a Fourteenth Amendment right to direct and control their children's medical care as well as other significant aspects of nurture, education and upbringing. *Meyer, supra*; *Pierce*, 268 U.S. at 535.

Here, the parents of participating students cannot be said to have given their full informed consent to the urinalysis testing, since participation in extracurricular activities by their children is not purely "voluntary." The Court rejected the argument that "voluntary" student participation rehabilitates otherwise unlawful state action in *Lee v. Weisman*. "The argument lacks all persuasion.... Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions...." 505 U.S. 577, 595 (1992) (Kennedy, J., concurring). In the same way, participation in extracurricular activities may be, strictly speaking, "voluntary," but it forms a significant, and often central, part of a student's educational experience, one that is critical not only to college and university

admissions committees but also to employers and to the full development of the intellectual, social and emotional capacities of the student. Just as the Constitution "forbids the State to exact religious conformity from a student as the price of attending her own high school graduation," *id.* at 596, it forbids the State to exact a sacrifice of fundamental Fourth Amendment liberties as the price of participating in the essential extracurricular life of the student body. "This is the calculus the Constitution commands." *Id. See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415, at 1416 (1989), and cases cited at nn. 4-6.[6]

"An essential, distinguishing feature of the special needs cases is that the person searched has consented.... The person searched has given consent, as defined to take into account that the consent was not voluntary in the full sense of the word." *Ferguson*, 121 U.S. at 1295 (Kennedy, J., concurring), citing *Skinner*, 489 U.S. at 615; *Von Raab*, 489 U.S. at 660-661; *Vernonia*, 515 U.S. at 650-651. *Cf. Ferguson*, 121 S.Ct. at 1296, n.1 (Scalia, J., dissenting) ("in all of those cases [citing *Chandler*, *Vernonia*, *Skinner*, *Von Raab*], the urine was obtained involuntarily").

Where parental "consent" cannot be said to be truly voluntary, but is factually and legally coerced, the notion that parental consent

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[6] Cases for the proposition that government cannot condition a right, benefit or privilege upon the coerced relinquishment of a constitutional right are legion. Those cited by Professor Sullivan include *Elrod v. Burns*, 427 U.S. 347 (1976); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Speiser v. Randall*, 357 U.S. 513 (1958); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of the Ind. Unemployment Sec. Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963); *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

to the testing vitiates the constitutional concerns engendered by the program is a constitutional *non sequitur*. A parent's relationship with his or her child, whether born or unborn, is considered a fundamental right that cannot be denied absent due process. *Santosky v. Kramer*, 455 U.S. 745, 753, 759 (1982); *Lassiter v. Dept. of Soc. Serv.*, 452 U.S. 18, 27 (1981); *Glona v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968). Although the interests of the State in protecting children may override parental rights in the presence of reasonable suspicion or probable cause in certain circumstances (necessitating intervention by school authorities in the educational context, or child protective services authorities in the home), in the absence of such particularized suspicion, the rights of parents must control. While the State has an interest in combating drug abuse on school campuses, this is a relatively recent interest in jurisprudence. An interest newly assertable is not protectable if it derogates a substantive liberty interest traditionally recognized as protectable. *Smith v. Org. of Foster Families*, 431 U.S. 816, 846 (1977). Conflict between perceived interests must be resolved by the one giving way to the deeply rooted and traditionally recognized right. *Michael H. v. Gerald D.*, 419 U.S. 110, 128-31 (1989). When the state both establishes a system of extra-curricular activity, which stands as an important benchmark of scholastic achievement, and conditions participation in that system on foregoing the important constitutional rights of privacy and parental control, its proffered interest in controlling perceived drug abuse cannot predominate in the absence of reasonable suspicion.

CONCLUSION

The Court's *amicus* respectfully submits that the need to revisit so soon after *Vernonia* what should have been an established area

of constitutional law after that decision arose because *Vernonia* did not actually state a workable, predictable rule for school drug testing program cases. This is clear from the Court of Appeals' inability to discern from its reading of *Vernonia* whether that decision approved drug testing based upon school officials' tutelary care of students, thus implying that general drug tests would pass constitutional muster; or whether it was based upon the demonstrated rampant drug abuse problem at this particular school:

> What is unclear from a simple reading of *Vernonia* is whether the Court's finding of a special need was based upon the school setting alone, with the concomitant need for school officials to maintain order and discipline, yet fulfill their tutelary and custodial obligations, or whether it was based upon that need in conjunction with the documented serious drug problem at the Vernonia schools.

242 F.3d at 1271, n. 6. While the majority opinion was long on rationale for approving the program at issue in that case, a rationale is not a rule; nor is a ruling ("vacated and remanded" in that case) a rule, in the sense that it does not supply reasonably delineated standards for courts and advocates to apply in order to predict outcomes in similar cases. The Court should take the opportunity presented by the present case to provide specific and clear guidance about the meaning of *Vernonia*, and to limit its application to circumstances in which protection of the health and safety of student athletes who are active participants in the drug culture is the purpose and scope of the program.

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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February 6, 2002

Supreme Court, U.S.
FILED
FEB 6 2002
CLERK

(9)

No. 01-332

IN THE
Supreme Court of the United States

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY ET AL.,
Petitioners,

v.

LINDSAY EARLS ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF JEAN BURKETT ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. A SCHOOL'S AUTHORITY TO ACT *IN LOCO PARENTIS* DOES NOT JUSTIFY A PROGRAM OF SUSPICIONLESS SEARCHES IN THE ABSENCE OF AN ORDER- OR SAFETY-RELATED NEED. 4

II. THE DRUG TESTING POLICY IS UNREASONABLE BECAUSE IT UNDERMINES THE INTEGRITY OF THE PARENT-CHILD RELATIONSHIP. 12

A. Many of the Students Subject to the Policy at Issue Here Have a Reasonable Expectation That Authority Figures Will Not Subject Them to Suspicionless Searches. 14

B. Parents Have a Constitutionally Protected Right To Direct Their Children's Upbringing. 18

CONCLUSION 21

APPENDIX A: List of *Amici Curiae* 1a

TABLE OF AUTHORITIES

CASES

Page(s)

Ambach v. Norwick, 441 U.S. 68 (1979) 10
Andreozzi v. Rubano, 141 A.2d 639 (Conn. 1958) 7
Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) 5, 9, 10
Brooks v. East Chambers Consolidated Independent School District, 730 F. Supp. 759 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991) 14
Chandler v. Miller, 520 U.S. 305 (1997) 3
City of Indianapolis v. Edmond, 531 U.S. 32 (2000) 3
Earls v. Board of Education, 242 F.3d 1264 (10th Cir.), *cert. granted*, 122 S. Ct. 509 (2001) 15
Farmer v. State, 275 S.E.2d 774 (Ga. Ct. App. 1981) 7
Goss v. Lopez, 419 U.S. 565 (1975) 7
Guirrieri v. Tyson, 24 A.2d 468 (Pa. Super. Ct. 1942) 7
H.L. v. Matheson, 450 U.S. 398 (1981) 19
Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988) 10
Hodgson v. Minnesota, 497 U.S. 417 (1990) 19
Ingraham v. Wright, 430 U.S. 651 (1997) 8
Keyes v. School District No. 1, 413 U.S. 189 (1973) 20
Mozert v. Hawkins County Board of Education, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988) 10
New Jersey v. T.L.O., 469 U.S. 325 (1985) ..... *passim*
Parents United for Better Schools, Inc. v. School District of Philadelphia Board of Education, 148 F.3d 260 (3d Cir. 1998) 7
Parham v. J.R., 442 U.S. 584 (1979) 10, 18, 19
Phillips v. Johns, 12 Tenn. App. 354, 1930 WL 1707 (Tenn. Ct. App. 1930) 7

TABLE OF AUTHORITIES—Continued

Page(s)

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 19
Prince v. Massachusetts, 321 U.S. 158 (1944) 10
Quilloin v. Walcott, 434 U.S. 246 (1978) 19
Santosky v. Kramer, 455 U.S. 745 (1982) 10, 19
Schaill v. Tippecanoe County School Corp., 679 F. Supp. 833 (N.D. Ind.), *aff'd*, 864 F.2d 1309 (7th Cir. 1988) 14
Smith v. W. Va. State Board of Education, 295 S.E.2d 680 (W. Va. 1982) 7
State v. Young, 216 S.E.2d 586 (Ga. 1975) 7
State ex rel. Gilroy v. Superior Court, 226 P.2d 882 (Wash. 1951) 7
Territory v. Cox, 24 Haw. 461, 1918 WL 1244 (Haw. Terr. 1918) 7
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 7
Troxel v. Granville, 530 U.S. 57 (2000) 19
United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 3
Vernonia School District 47J v. Acton, 515 U.S. 646 (1995) ..... *passim*
Watkins Glen Central School District v. National Union Fire Insurance Co., 732 N.Y.S.2d 70 (App. Div. 2001) 7
Wisconsin v. Yoder, 406 U.S. 205 (1972) 10, 11, 19

CONSTITUTIONAL & STATUTORY PROVISIONS

U.S. Const. amend. IV 3
Ala. Code § 13A-13-6 12
Md. Code Ann., Educ. § 7-301(c) 12
Tenn. Code Ann. § 39-17-1312 12

TABLE OF AUTHORITIES—Continued

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Page(s)

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BRIEF OF AMICI CURIAE

Amici respectfully submit this brief to make two points:

First, the doctrine of *in loco parentis* does not authorize school officials to conduct suspicionless drug tests on all students who engage in extracurricular activities. That common law doctrine traditionally provides for a specific and narrow delegation of a subset of parental authority to school officials—the authority to take necessary steps to protect the safety of the students and to preserve order in the classroom, but not to usurp a parent's right to make childrearing decisions having little bearing on school safety or discipline. The doctrine properly informs an understanding of a student's reasonable expectation of privacy, and was sensibly invoked to support the conclusion in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), that drug testing, in the face of open rebellion in the classroom and when necessary to protect the safety of student athletes, did not violate reasonable expectations of privacy. It has no reasonable application, however, to the very different facts of this case.

Second, the institution of suspicionless drug testing, where it cannot be justified as a valid exercise of traditional *in loco parentis* authority, is (a) inconsistent with students' reasonable expectation that they will be treated with dignity and respect by persons in positions of authority; and (b) interferes with the rights of parents to foster relationships with their children based on openness and mutual respect.

INTEREST OF *AMICI CURIAE*[1]

Amici include 19 parents and grandparents of children who attend, have attended, or will attend Tecumseh High

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[1] This brief was authored in its entirety by undersigned counsel for *amici curiae*. No person or entity, other than the named *amici curiae* and their counsel and members, made any monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief are on file with the Clerk of this Court.

School, five parents of children from nearby school districts who fear implementation of a similar mandatory drug testing policy at their children's schools, and one parent who schools his child at home. They vigorously object to the Student Activities Drug Testing Policy ("Policy") implemented by the Petitioners, which requires students in the seventh through twelfth grades in the Tecumseh School District to submit to suspicionless urinalysis drug testing by the school as a condition of participating in a range of extracurricular activities not limited to competitive athletics. *Amici* oppose the Policy because it takes parenting away from the parents; it unfairly targets children who are unlikely to use drugs; it stamps a badge of shame onto children whose parents might wish to approach the issue of drug use without imposing mandatory urinalysis on their children; it unnecessarily forces parents to choose between two parenting strategies they deem essential—encouraging participation in extra-curricular activities and maintaining a parent-child relationship based on trust and respect; it creates an atmosphere of distrust and disrespect at school, and potentially at home; and it usurps parents' authority to make decisions about how their children are raised. These parents disagree with the proposition that the school district is entitled to assault the integrity of the parent-child relationship.

Although the Petitioners point to a community meeting convened by the local Board of Education to seek community input regarding the proposed Policy, *see* Pet. Br. 8, *amici* did not know about that meeting at the time. Instead, *amici* first learned about the Policy when it was imposed on their children, or, in the case of *amici* whose children were not then attending Tecumseh High School, when word of the lawsuit giving rise to the present case spread through their small community. A complete list of *amici* is set forth in Appendix A.

SUMMARY OF ARGUMENT

The Fourth Amendment by its terms prohibits "*unreasonable* searches." U.S. Const. amend. IV. This Court accordingly has held time and again that "the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995); *see New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (noting that "the underlying command of the Fourth Amendment is always that searches and seizures be reasonable"). While it is true that "what is reasonable depends on the context within which a search takes place," *T.L.O.*, 469 U.S. at 337, a search is "ordinarily unreasonable in the absence of individualized suspicion of wrongdoing," *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2001); *see Chandler v. Miller*, 520 U.S. 305, 308 (1997); *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976). Indeed, a search must be supported by some degree of individualized suspicion in all but certain "limited circumstances." *Edmond*, 531 U.S. at 37.

In the school context, whether it is reasonable to dispense with the *individualized* suspicion requirement depends on the totality of the circumstances. As this Court has explained, "the legality of a search of a student should depend . . . on the reasonableness, under all the circumstances, of the search." *T.L.O.*, 469 U.S. at 341; *see id.* at 337 ("Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place.").

Amici submit that two key points should inform the reasonableness inquiry in this case. *First*, the drug testing at issue in this case is not necessary to protect students from impending physical harm or to prevent classroom disruption. It is certainly true that students' reasonable expectation of privacy at school is reduced to the extent that the school acts as a "guardian and tutor of children entrusted to its care." *Vernonia*, 515 U.S. at 655. But even in this setting, suspi-

cionless searches are impermissible in the absence of a need to protect order and safety in the school environment. Contrary to the Petitioners' contention, the fact that schools act *in loco parentis* with respect to their students does not justify—in the absence of concerns about physical safety or disruption to which the *in loco parentis* doctrine has historically been addressed—dispensing with the individualized *suspicion* requirement when evaluating Fourth Amendment searches in the school context.

Second, a school's constitutional obligation to exercise its authority to act *in loco parentis* in a reasonable fashion includes an obligation not to act in a way that unduly intrudes upon the parent-child relationship. Many parents, including *amici*, prefer to approach the issue of drug use with their children in an environment of trust and respect. For a school to impose a wholesale policy of suspicionless drug tests on students who are not engaged in activities (such as competitive sports) that involve enhanced safety risks would be to place an unjustifiably exacting toll on the integrity of the relationship between those students and their parents. Indeed, it would sabotage parents' reasonable attempts to base their relationship with their children on principles of trust and open communication.

ARGUMENT

I. A SCHOOL'S AUTHORITY TO ACT *IN LOCO PARENTIS* DOES NOT JUSTIFY A PROGRAM OF SUSPICIONLESS SEARCHES IN THE ABSENCE OF AN ORDER- OR SAFETY-RELATED NEED.

In evaluating the drug testing policy at issue in *Vernonia*, this Court observed that "Fourth Amendment rights . . . are different in public schools than elsewhere," 515 U.S. at 656, and that "'students within the school environment have a lesser expectation of privacy than members of the population generally,'" *id.* at 657 (quoting *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring)). A principal reason for this diminished privacy expectation, the Court reasoned, is the "custo-

dial and tutelary" authority that schools typically exercise over their students, which "permit[s] a degree of supervision and control that could not be exercised over free adults." *Id.* at 655. That authority, in turn, derives in part from the principle that "schools stand *in loco parentis* over the children entrusted to them." *Id.* at 654. Just as children have diminished reasonable expectations of privacy from parents' intrusions into their lives, students' reasonable expectation of privacy is lessened at school, in circumstances where school authorities act *in loco parentis* and assume "responsibilities . . . as guardian and tutor of [the] children entrusted to [their] care." *Id.* at 665.

The Petitioners herein seize on this language in *Vernonia* (Pet. Br. 26, 33-36), contending that the case stands for the proposition that students' reasonable expectation of privacy at school is so diminished that schools may engage in wholesale suspicionless searches without regard to the presence or absence of the very safety-related concerns on which this Court in *Vernonia* appears to have relied—the interest in protecting student athletes from the increased risks associated with drug use among students who engage in competitive athletic activities. The Petitioners' argument, however, fundamentally misunderstands both what it means for a school to act *in loco parentis* and the consequences of that historic authority on students' privacy expectations in school.

As this Court has observed, while public school officials exercise coercive state authority and thus remain state actors within the meaning of the Fourteenth Amendment, "for many purposes 'school authorities ac[t] *in loco parentis*.'" *Vernonia*, 515 U.S. at 655 (quoting *Bethel Sch. Dist. No. 43 v. Fraser*, 478 U.S. 675, 684 (1986)). One who acts *in loco parentis* acts "[i]n the place of a parent; instead of a parent . . . ." *Black's Law Dictionary* 787 (6th ed. 1990). The Petitioners, however, grossly overestimate the range of purposes for which a school official may legitimately act *in loco parentis*. Indeed, examination of the origins of the principle reveals

that the Petitioners' invocation of *in loco parentis* to justify suspicionless drug testing in the absence of an identifiable threat to order in the school environment or to students' physical safety (such as this Court emphasized in *Vernonia*) would untether the doctrine from its traditional common law moorings.

At common law, the principle of *in loco parentis* was understood as a limited delegation of parental authority for the specific purpose of preserving the order and discipline of the school environment. As Blackstone defined the principle, a parent

> may . . . delegate *part* of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a *portion* of the power of the parent committed to his charge, viz. *that of restraint and correction*, as may be necessary to answer the purposes for which he is employed.

1 W. Blackstone, *Commentaries on the Laws of England* 453 (1769) (emphases added), *reprinted in* 1 Blackstone, *Commentaries on the Law of England in Four Books* 427-28 (William Draper Lewis ed., 1897); *see Vernonia*, 515 U.S. at 655 (quoting Blackstone).

This delegation conveys to school officials only a fraction of parental authority and only for the specific purpose of preserving order and safety. A school's *in loco parentis* authority is not a generalized quasi-parental right empowering the school to make fundamental choices regarding a child's rearing. Those decisions have always belonged to the parent. The principle of *in loco parentis* has never given schools blanket authority to upset them.

Rather, the common law *in loco parentis* doctrine has historically been understood to be a specific and narrow doctrine, empowering school officials to make decisions to preserve school order and discipline to the extent necessary to

create a safe learning environment for the students. *Farmer v. State*, 275 S.E.2d 774, 775 (Ga. Ct. App. 1981) (a "school official stands *in loco parentis*" and "must be allowed reasonable bounds for the preservation of order and discipline") (quoting *State v. Young*, 216 S.E.2d 586 (Ga. 1975) (concurring opinion)); *State ex rel. Gilroy v. Superior Court*, 226 P.2d 882, 886 (Wash. 1951) ("Schoolteachers, at least for purposes of discipline, stand *in loco parentis* . . . ."); *Phillips v. Johns*, 12 Tenn. App. 354, 1930 WL 1707, at *3 (1930) (finding that search of a child was outside the scope of teacher's *in loco parentis* power, because it was not "necessary to educate him or her and to preserve order necessary to the carrying on of the same").[2] In the absence of a need related to the safety or order of the educational environment (such as the need this Court emphasized in *Vernonia*), the

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[2] *See also, e.g., Watkins Glen Central Sch. Dist. v. National Union Fire Ins. Co.*, 732 N.Y.S.2d 70, 74 (App. Div. 2001) ("While they are not insurers of the safety of their students, schools, acting *in loco parentis*, are charged with the duty of adequately supervising their students."); *Andreozzi v. Rubano*, 141 A.2d 639, 641 (Conn. 1958) ("A teacher stands *in loco parentis* toward a pupil. He must maintain discipline, and if a pupil disobeys his orders it is his duty to use reasonable means to compel compliance."); *Guirrieri v. Tyson*, 24 A.2d 468, 469 (Pa. Super. Ct. 1942) ("These teachers stand *in loco parentis* to the child . . . . Under the delegated parental authority implied from the relationship of teacher and pupil, a teacher may inflict reasonable corporal punishment on a pupil to enforce discipline . . . ."); *Territory v. Cox*, 24 Haw. 461, 1918 WL 1244, at *3 (Haw. Terr. 1918) (noting that *in loco parentis* gives schoolmaster "the right to inflict reasonable corporal punishment upon his pupil for such misbehavior as has a direct and immediate tendency to injure the school or to subvert the master's authority"); *see also Parents United for Better Schools, Inc. v. School Dist. of Philadelphia Bd. of Educ.*, 148 F.3d 260, 273 n.7 (3d Cir. 1998) (in approving condom distribution program, noting that "the common law concept of *in loco parentis* authority" was not implicated, because "[h]ere, the Board is acting as educator, not *in loco parentis*"); *Smith v. W. Va. State Bd. of Educ.*, 295 S.E.2d 680, 685 (W. Va. 1982) ("Even though the *in loco parentis* doctrine covers more than the discipline of school children, it is not without constitutional limitations.") (citing *Goss v. Lopez*, 419 U.S. 565 (1975); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)).

authority to make fundamental decisions regarding a child's rearing is *not* delegated to school officials—that authority remains with the parent. For this reason, the common law understanding of *in loco parentis* cannot be invoked to justify the suspicionless search at issue here.

This Court's treatment of the *in loco parentis* doctrine generally accords with this accepted common law understanding. For example, in *Ingraham v. Wright*, 430 U.S. 651 (1977), this Court held that corporal punishment in schools without prior notice and hearing did not violate the Constitution. The Court reasoned that the punishment was "reasonably necessary 'for the proper education of the child and for the maintenance of group discipline.'" *Id.* at 662 (quoting 1 Fowler Vincent Harper & Fleming James, Jr., *Law of Torts* § 3.20, at 292 (1956)). That authority is derived from the core aspects of the *in loco parentis* power—the need to maintain an orderly educational environment and to discipline students—not an authority to stand in the parents' shoes on a wholesale basis.[3]

Similarly, this Court's decision in *T.L.O.*, permitting the search of a student's purse without probable cause, relied expressly on the school's unique need to maintain order. The Court emphasized that "the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools." 469 U.S. at 343; *see also id.* at 384 (Stevens, J., concurring in part and dissenting in part) ("Because this conduct was neither unlawful nor significantly disruptive of school order or the educational process, the invasion of privacy associated with the forcible opening of T.L.O.'s purse was entirely unjustified at its inception."); *id.* at 363 (Brennan, J., concurring in part and dissenting in part) (referring to goal of "maintaining an effective educational setting").

[3] Even in the context of preserving order—the core of the *in loco parentis* delegation—school officials of course remain state actors for constitutional purposes: "In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment." *T.L.O.*, 469 U.S. at 336-67.

At most, therefore, the *in loco parentis* doctrine authorizes school officials to take actions necessary to preserve order in the schools and to protect students from physical harm, such as the dangers of drug use among athletes engaged in dangerous physical activity. The Policy at issue here, in sharp contrast, is designed to control the behavior, both inside and outside the school environment, of a far larger proportion of the student body not engaged in such dangerous activities. The authority to make those decisions, however, belongs to and remains with the parents. Where order and safety are not threatened, *in loco parentis* does not expand the authority of school officials, and, by the same token, does not diminish a student's reasonable expectation of privacy.

It is true that in *Vernonia*, this Court indicated that schools "for many purposes" act *in loco parentis* with the power to "inculcate the habits and manners of civility," 515 U.S. at 655 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684, 681 (1986)). And in *Fraser*, the Court invoked *in loco parentis* authority as a reason a school official might seek to protect minors from vulgar and offensive language. 478 U.S. at 684. *Fraser*'s invocation of *in loco parentis*, however, was far from necessary to the holding in the case, and in fact was little more than surplusage. Indeed, *Fraser*'s reference to *in loco parentis* is more confusing than clarifying, as the school authority at issue in that case stemmed from general state interests and not common law delegation specific to the needs of schools. Rather than a broad right of the school official to stand in the place of the parent to establish values and standards of behavior, the *Fraser* Court was relying on the school officials' right to "'inculcat[e] fundamental values necessary to the maintenance of a

democratic political system.'" 478 U.S. at 681 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)). This includes schools' right to determine their own curriculum, *see Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 278-79 (1988); to keep students from engaging in school-sponsored speech that intrudes on the sensitivities of other students, *see Fraser*, 478 U.S. at 682; to keep schools from appearing as if they support certain political viewpoints through school-sponsored publications, *see Hazelwood*, 484 U.S. at 266-67; and to "[t]each[] students about complex and controversial social and moral issues," *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1071 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

This power of school authorities is more aptly characterized as the power of the state to act as *parens patriae*, "in preserving and promoting the welfare of the child" *Santosky v. Kramer*, 455 U.S. 745, 766 (1982). That power, a component of the state's police power, reflects the state's authority to direct children to accomplish state interests, for example, the interest in educating its citizenry, notwithstanding any contrary wishes of their parents. Thus, the state has invoked this authority to argue for compulsory education despite parents' religion-based wishes to the contrary, *see Wisconsin v. Yoder*, 406 U.S. 205, 229 (1972); to argue for a right to help parents admit their minor children to mental hospitals, *see Parham v. J.R.*, 442 U.S. 584, 605 (1979); and to argue for their right to enforce child labor laws, *see Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). But when a parent's fundamental constitutional right to direct the upbringing of his or her child is genuinely at stake, a state—when it is exercising this police power, and cannot be said to invoke an additional delegated *in loco parentis* authority—must demonstrate a compelling interest in order to override a parent's contrary direction.[4] Thus, for example, the parents' rights in

[4] Commentators have long criticized the invocation of *in loco parentis* in evaluating the scope of a school's general power as a state actor:

> One of the things that makes *in loco parentis* such an erroneous phrase in this context is precisely the absence of a genuinely parental protective concern for the student who is threatened with the school's power. It is presumably a characteristic of the use of parental force against a child that the force is tempered by understanding and love based on a close, intimate, and permanent child-parent relationship. What so many of the courts persist in talking about as a parental relationship between school and student is really a law enforcement relationship in which the general student society is protected from the harms of anti-social conduct.

Wayne R. LaFave, 4 *Search & Seizure* § 10.11(a) (3d ed. 2002) (quoting William G. Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 Iowa L. Rev. 739, 768 (1974)).

Yoder could not be overridden by the general invocation of government authority in part because it was "not [a case] in which any harm to the physical or mental health of the child or the public safety, peace, order, or welfare has been demonstrated or may be properly inferred." 406 U.S. at 230. Accordingly, where the only font of state authority is its power to act as *parens patriae* under the state's plenary police power, that authority by itself does not warrant dispensing with the standard Fourth Amendment requirement of individualized suspicion.

This distinction between the principle of *in loco parentis*—a narrow delegation of parental authority to the school for the purpose of protecting safety and maintaining order—and the broader doctrine of *parens patriae*—a state authority to act contrary to a parent's wishes, and even to override fundamental choices regarding childrearing when justified by a compelling interest—accords with traditional limits on a school's authority. Specifically, the scope of a school's authority is derived from, and premised on, its duties. Parents, not schools, are responsible for ensuring that children are safe or well-behaved when they are outside the school's custodial control. Indeed, even while their children are in school, parents can be held liable or even criminally respon-

sible for their children's actions; can be held responsible for failure properly to supervise their children; and can be held responsible if their children fail to arrive at school at all. *See, e.g.*, Ala. Code § 13A-13-6 (assigning guilt to a parent who "fails to exercise reasonable diligence in the control of such child to prevent him or her from becoming . . . a 'delinquent child'"); Md. Code Ann., Educ. § 7-301(c) (holding parents strictly liable when student is truant); Tenn. Code Ann. § 39-17-1312 (punishing "inaction by parents or guardians of minors illegally possessing a firearm"). Accordingly, in the absence of threat to the safety of the student body or the need to maintain order in the classroom, students maintain a reasonable expectation that they will not be subject to suspicionless searches designed to control their behavior more generally.

In light of these principles, the Court of Appeals properly distinguished this case from *Vernonia*. This Court found the drug testing in *Vernonia* reasonable because "'strict adherence to the requirement that searches be based on probable cause' would undercut 'the substantial need of teachers and administrators for freedom to maintain order in the schools.'" 515 U.S. at 653 (quoting *T.L.O.*, 469 U.S. at 340, 341). Here, as the Court of Appeals noted, that substantial need to maintain order—the foundation of the *in loco parentis* authority—is absent. Accordingly, the students who are subject to the policy at issue here maintain a reasonable expectation of privacy that is violated when they are subject to suspicionless drug testing.

II. THE DRUG TESTING POLICY IS UNREASONABLE BECAUSE IT UNDERMINES THE INTEGRITY OF THE PARENT-CHILD RELATIONSHIP.

Vernonia instructs that in determining whether a search by school officials is reasonable, "the relevant question is whether the search is one that a reasonable guardian and tutor might undertake." 515 U.S. at 665. In this context, a school's obligation to act reasonably includes an obligation to act in such a manner that does not unduly intrude on the

parent-child relationship. Many parents, including *amici*, choose to develop relationships with their children premised on dignity and respect. To require children who are not engaged in activities involving enhanced safety risks to submit to suspicionless drug testing would undermine those chosen values by signaling to children that they do not deserve such dignity and respect. Thus, such testing not only violates the students' reasonable expectations of privacy, but also profoundly interferes with the ability of *amici* to raise their children in accordance with their own values. In the absence of particular circumstances requiring more intrusive state action to preserve order and safety in schools, the decision to drug test children without individualized suspicion belongs in the home, where courts have long recognized the sanctity of the parent-child relationship. Within that relationship, *amici* reject blanket drug testing because it destroys the trust and open communication that parents strive so hard to foster with their children. It would be unreasonable for a school to compromise that respect and dignity except where the preservation of school safety and order demand it.

The Policy's costs—infringement on the private sphere of parental decisionmaking and damage to the parent-child bond—flow from any effectively mandatory school drug testing policy not based on individualized suspicion. Although not specifically delineated in *Vernonia*, any constitutional assessment of such a program must take these costs into account because "the legality of a search of a student should depend . . . on the reasonableness, *under all the circumstances*, of the search." *T.L.O.*, 469 U.S. at 341 (emphasis added). The Policy's collateral damage to parental authority and the parent-child relationship is a consequence of constitutional significance. In the contextualized reasonableness inquiry that the Fourth Amendment requires, *see id.* at 337, these costs, when balanced against the government's interest in the absence of any special need, render the Policy unreasonable and therefore in violation of the Fourth Amendment.

A. Many of the Students Subject to the Policy at Issue Here Have a Reasonable Expectation That Authority Figures Will Not Subject Them to Suspicionless Searches.

Because applicable Fourth Amendment analysis focuses on whether a government action interferes with reasonable expectations of privacy, it is appropriate to examine whether students who are subject to the Petitioner's Policy expect authority figures to subject them to suspicionless searches. *Amici* contend that the students subject to this Policy have formed reasonable expectations, based on the respect *amici* show their children, that they will not be subject to such treatment.

As parents of children who are, have been, or will be affected by blanket, suspicionless drug testing, *amici* submit that the Policy imposes unreasonable burdens on the parent-child relationship. In fact, the Policy causes great harm to the parent-child bond by breaking down custodial relationships based on free communication, trust, and respect and by stamping students who participate in extracurricular activities—students who are *less* likely to take drugs[5]—with a

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5 *See Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 730 F. Supp. 759, 764 (S.D. Tex. 1989) ("[L]ogic would dictate that students who participate in athletics and other extra-curricular activities are, in fact, less likely to use drugs . . . ."), *aff'd*, 930 F.2d 915 (5th Cir. 1991); *Schaill v. Tippecanoe County Sch. Corp.*, 679 F. Supp. 833, 843 (N.D. Ind.), *aff'd*, 864 F.2d 1309 (7th Cir. 1988) (citing sports psychologist's testimony that "research indicated that students who engage in extracurricular activities such as sports, are less likely to use drugs than the general school population"); National Institute on Out-of-School Time, Wellesley College, *Fact Sheet on School-Age Children's Out-of-School Time*, *available at* http://www.wellesley.edu/WCW/CRW/SAC/factsht.html (visited Feb. 4, 2002) ("Students who spend 1-4 hours per week in extracurricular activities are 49% less likely to use drugs . . . than students who do not participate in extracurricular activities."); *If Sports Build Character, Why Test High-School Athletes for Drugs?*, L.A. Times, July 3, 1995, at 5 (quoting school principal saying "Our athletes are the least likely to be involved in substance abuse problems, quite frankly, because

badge of shame. As the Court of Appeals noted, "the Policy, from a safety perspective, tests both too many students and too few. In essence, it too often simply tests the wrong students." *Earls v. Board of Educ.*, 242 F.3d 1264, 1277 (10th Cir. 2001) (footnote omitted).

Many parents approach the task of child-rearing by encouraging trust and individual responsibility for their children. This kind of relationship is based on open communication between the parents and the child. The Tecumseh High School drug testing Policy directly interferes with such relationships. Drug counselors, pediatricians and psychology professors have indicated that proactive drug testing tends to interfere with a trust-based relationship between a parent and child. *See, e.g.*, Sean Davidson, *Troubled Kids, Bad Science?*, Globe and Mail (Toronto), July 17, 2001, at R6; Amanda Vogt, *Drug Test Kits Offer Answer to Worried Parents But Critics Still Question*[] *Its Use*, Chi. Trib., Sept. 12, 2001, at 3; American Academy of Pediatrics Committee on Substance Abuse, *Testing for Drugs of Abuse in Children and Adolescents*, 98 Pediatrics 305, 305 (1996). By subjecting a child to a drug test, a parent (or someone acting in the place of a parent) creates an atmosphere of mistrust and encourages deception. *See* Vogt, *supra*, at 3 ("The test creates the opportunity for deception and distrust, which creates the opportunity to erode communication between parent and child.") (quoting Peter Palanca, psychiatrist and president of Hazelden Chicago, a drug abuse treatment center). As a result, the child is likely to feel as though she has not been treated fairly, which in turn will interfere with effective communication. *See* Davidson, *supra*, at R6; *see also Drug Test Kits Bad for Families*, Daily Telegraph (Austr.), May

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they are engaged for much longer parts of the day."); Lee Shilts, *The Relationship of Early Adolescent Substance Use to Extracurricular Activities, Peer Influence, & Personal Attitudes*, 26 Adolescence 613, 615-16 (1991) ("nonusing adolescents . . . tended to be highly involved in extracurricular activities").

29, 2001, at 9 (discussing tests to detect drug residue on surfaces as something that could alienate teenagers, lead to confrontation with parents, and exhibit a lack of trust).

The students who are subject to this Policy have formed reasonable expectations that they will not be treated in such a manner. Indeed, it is widely believed that introducing this sort of mistrust into a child's life is inconsistent with a parent-child relationship based on openness and mutual respect. *See* Claire Martin, *Drug Deterrent? Use of Home Testing Kits May Ruin Trust, Experts Say*, Denv. Post, Nov. 7, 1999, at F11 (drug testing "would certainly break down the trust between parent and child") (quoting DARE Colorado Executive Director Russ Ahrens); *cf.* Brendan January, *Alcohol Kit Puts Teens to the Test*, Star-Ledger (Newark, N.J.), Jan. 24, 2001, at 029 (citing a clinical psychology professor who indicated that an alcohol test may be seen by the child as a breach of trust). It is thus far from clear that drug testing is something that reasonable parents would undertake, particularly when they do not even suspect their children of drug use. Indeed, students' diminished trust both of their parents and of their school may actually *increase* the likelihood that they will turn to drug use without consulting a custodial adult.

There is evidence that suspicionless drug testing is harmful to children in other ways as well. For example, the threat of testing may induce adolescents using marijuana to switch to more potent drugs that are more difficult to detect through urine tests. *See* Davidson, *supra*, at R6 (citing substance abuse center source who indicated that drug testing will induce kids to switch to harder drugs that are less detectible, such as LSD, cocaine, and heroin). In addition, testing students who engage in extra-curricular activities may discourage students from participating in such activities,[6] which in

[6] Students may be discouraged for a number of reasons. For example, they may fear detection of actual illegal drug usage, they may wish to protect their privacy, or they may be embarrassed by the drug testing procedure.

turn may make them more likely to abuse alcohol or other drugs.[7]

Perhaps most important, the institution of mandatory drug testing in schools sends a negative message to children about their schools, their relationship with their parents (who must sign consent forms to allow them to participate in certain extracurricular activities at Tecumseh High), and their trustworthiness.

Effective alternatives to mandatory testing are available, the most obvious being testing based on individualized suspicion. The American Academy of Pediatrics Committee on Substance Abuse has recommended against mass suspicionless screening for drug use as a prerequisite to participation in extra-curricular activities, which it found unlikely to detect most drug users. *See* American Academy of Pediatrics Committee on Substance Abuse, *supra*, at 305-06. Instead, the Academy recommended a response that depends, first, on identifying children suspected of drug use and then referring them for a "comprehensive evaluation by a qualified health care professional." *Id.* at 307. Thus, even if students' safety or school discipline were implicated, or even if the school's interest in protecting its own public image were sufficient to permit some kind of drug testing program (as the Petitioners appear to suggest, *see* Pet. Br. 46 n.27), the Policy at issue in this case is not a reasonable means of achieving those ends.

[7] *See* Jeanne E. Jenkins, *The Influence of Peer Affiliation & Student Activities on Adolescent Drug Involvement*, 31 Adolescence 297, 304 (1996) ("Involvement in school, as indicated through . . . extracurricular involvement do[es] show a relationship to decreased . . . drug use."); Royer Cook, *The Alternatives Approach Revisited: A Biopsychological Model and Guidelines Application*, 20 Int'l J. of Addictions 1399, 1399 (1985) ("[I]ndividuals provided with healthful, nonchemical ways of gaining rewards and pleasures will be less likely to engage in drug or alcohol abuse.") (abstract).

Testing based on reasonable suspicion would be far more likely to detect students using drugs, and far less likely to inflict the harms *amici* fear. Where individualized suspicion exists, the reasonableness inquiry would produce a result different from the one here, and students could not reasonably expect that they would not be subject to search on that basis. But in light of the environment of open communication, trust, and respect that parents typically seek to foster with their children, the wholesale implementation of suspicionless searches plainly violates reasonable expectations of privacy that students will have formed.

B. Parents Have a Constitutionally Protected Right To Direct Their Children's Upbringing.

The Policy in this case usurps parents' rights to determine whether drug testing, without individualized suspicion, is an appropriate component of child rearing when children are not engaged in heightened-risk activities. In answering the key question identified in *Vernonia*—whether a reasonable guardian and tutor would undertake the search at issue, *see* 515 U.S. at 665—it is important to keep in mind "the traditional presumption that the parents act in the best interests of their child." *Parham v. J.R.*, 442 U.S. 584, 604 (1979); *id.* at 602 ("historically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children"). Indeed, the *Vernonia* Court took care to note, in upholding the policy at issue there, that "the primary guardians of Vernonia's schoolchildren appear to agree" with the school that suspicionless drug testing of athletes to promote safety is a reasonable action. 515 U.S. at 665; *see also id.* (recognizing parents' unanimous approval of the policy at issue in that case).

The respect paid by the *Vernonia* Court to the parental prerogative to make fundamental decisions regarding the rearing of one's child was well founded. As this Court has observed, parents' interest in the care, custody, and control of their children is "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion); *see also Santosky v. Kramer*, 455 U.S. 745, 774 (1982) (recognizing that "the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment") (Rehnquist, J., dissenting); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (acknowledging "that the relationship between parent and child is constitutionally protected"); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (observing that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations"). Accordingly, except in rare instances of parental unfitness, there will "normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 U.S. at 68-69.

Indeed, this Court has relied on the constitutional significance of parental rights in insulating numerous aspects of childrearing from state interference. *See, e.g., H.L. v. Matheson*, 450 U.S. 398, 410 (1981) (plurality opinion) (upholding requirement that minor notify parent before seeking abortion); *Hodgson v. Minnesota*, 497 U.S. 417, 446-54 (1990) (Stevens, J., joined by O'Connor, J.) (same); *Troxel*, 530 U.S. at 75 (denying visitation rights to grandparents when parents object); *Wisconsin v. Yoder*, 406 U.S. 205, 232-34 (1972) (permitting Amish parents to exempt their children from state compulsory education laws). Because of the fundamental nature of this right, only significant interests can outweigh it. *See, e.g., Parham*, 442 U.S. at 604 (holding that minor's interest in liberty outweighed parent's childrearing rights when parent sought to commit child to mental institution).

Accordingly, in cases where, as here, a school intrudes upon students' liberty and privacy interests in a manner at odds with the preferences of the students' parents, the intrusion implicates not only the students' constitutional interests but also the parents' fundamental constitutional right to decide what is in the their children's best interest. And where the intrusion comes by way of suspicionless drug searches of students whose parents prefer to address issues of drug use in an environment of openness and trust, it undermines the right of parents to cultivate the parent-child relationship as they see fit. *See Keyes v. School Dist. No. 1*, 413 U.S. 189, 247 (1973) (Powell, J., concurring in part and dissenting in part) ("[T]he interest of the parent in the enhanced . . . parent-child communication . . . ought not to be suppressed by force of law."); *Random Testing in Florida School District Spurs National Debate*, 9 Alcoholism & Drug Abuse Week 1 (Oct. 6, 1997) (citing prevention group director saying that "many pediatricians are slow to test children and adolescents for drug use, not wanting to intrude on the parent-child relationship").

The point here is not that a reasonable parent would necessarily object in all cases to a school's suspicionless drug testing of her child. Rather, the point is that many reasonable parents *do* justifiably object to such testing where the school is not responding to a special need to preserve order and safety, and that a system of mandatory drug testing denies parents the power to decide whether their children ought to be subject to such testing. In the absence of individualized suspicion or an acute need to protect school safety and order, such an intrusion on parental prerogative is manifestly unreasonable.

CONCLUSION

The Petitioners have stepped outside the bounds of their delegated custodial power by instituting this mandatory, suspicionless, mass drug-testing Policy without demonstrating a compelling need for order or safety. Accordingly, in addition to the obvious intrusion on Tecumseh High School students' undiminished, reasonable expectations of privacy, the Petitioners have interfered with the integrity of the parent-child relationship and the fundamental constitutional right of parents to make choices about how to raise their children. The Policy fails the reasonableness requirement of the Fourth Amendment. For the reasons stated in this brief, and the reasons advanced by the Respondents, the Court should affirm the decision of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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February 2002

APPENDIX A

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   Mother of pre-high school children in a nearby school district
2. Marc and Kim Chapman
   Parents of pre-high school children in a nearby school district
3. Thomas Charles Chapo and Wanda Chapo
   Parents of children who graduated from Tecumseh High School who participated in Pom Pon and athletics
4. John C. Earls, Jr.
   Grandfather of Lindsay and Lacey Earls
5. Larry and Tammy Earls
   Parents of children who will attend Tecumseh High School
6. John Paul Gokey, Sr. and Judy Rene Gokey
   Parents of daughter who graduated from Tecumseh High School who participated in choir and color guard and son who attends Tecumseh High School and participates in Future Farmers of America
7. Sharon Hughes
   Mother of children in a nearby school district
8. Karen S. and Mark W. Jones
   Parents of two daughters who attend Tecumseh High School and participate in Future Farmers of America
9. Blaine Morris
   Father of pre-high school child
10. Hollis M. Morris
    Father of daughter who is being schooled at home

11. Randall and Jacqueline O'Rorke
Parents of son who graduated from Tecumseh High School and participated in Future Farmers of America

12. Jack W. and Rachel L. Reece
Parents of children who graduated from Tecumseh High School and grandparents of children who go to Tecumseh High School and participate in Future Farmers of America

13. Jackie and Tammy Dail Reece
Parents of daughter who will attend Tecumseh High School

14. Harvey and Wendy Reynolds
Parents of children who will attend Tecumseh High School

15. Mary Pinson Thomas
Mother of son who graduated from Tecumseh High School and participated in Future Farmers of America

16. Sharon R. Trammell
Mother of daughter who graduated from Tecumseh High School

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Supreme Court, U.S.
FILED
FEB 6 2002
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No. 01-332

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY AND INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY, PETITIONERS,

v.

LINDSAY EARLS, LACEY EARLS, ET AL., RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief of *Amici Curiae* American Academy of Pediatrics, National Education Association, American Public Health Association, National Association of Social Workers, NASW-Oklahoma Chapter, National Council on Alcoholism and Drug Dependence, Center for Law and Education, Loyola Child Law Center, and Lawyers for Children, Inc., In Support of Respondents

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TABLE OF CONTENTS

Table of Authorities iii

Interest of *Amici Curiae* 1

Preliminary Statement 2

Summary of Argument 3

I. The Educational And Developmental Context Highlights The Policy's Constitutional Defects 6

II. Extracurricular Involvement Is Broadly Beneficial And Is A "Protective Factor" For Adolescents At Particular Risk of Substance Abuse 7

A. Young People Derive Important Benefits From Extracurricular Participation 7

B. Participants Are Far Less Likely To Use Alcohol, Tobacco Or Other Drugs Than Are Less Involved Peers 10

C. Extracurricular Involvement Plays An Important, Protective Role 11

III. A Policy Like Tecumseh's Will Operate, Unjustifiably, To *Deny* Important Benefits And Anti-Drug Protections 13

A. Many Students Find Testing Policies Intensely – Or Intolerably – Intrusive on Privacy 14

1. The Urine Collection Is Itself A Significant Intrusion 15

2. Students' Privacy Concerns Extend Beyond The Collection Process 18

B. Students Will Be Deterred From Extracurricular Involvement, With Far-Reaching, Negative Consequences 19

IV. The Policy Is Ill-Suited To The Public Health Purposes Claimed For It 22

A. Drug-Testing Regimes Like Tecumseh's May Not Lead To More Healthy Behavior 22

B. The Policy Ill Serves The Treatment Needs Of Students Who *Do* Have Substance Abuse Problems 24

V. Tecumseh's Policy Does Not Respect The Proper Allocation of Responsibility Among Parents, Doctors And Schools 26

A. Drug-Use Detection Is Not A Necessary Part of Public Schools' Core Responsibilities 26

B. Schools' Pursuit Of Generalized Student Health Objectives Are – And Must Be – More Respectful of Parental And Medical Judgment 27

C. Tecumseh's Policy Fails To Respect Parental Prerogatives And Medical Expertise 29

Conclusion 30

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Interest of *Amici Curiae*[*]

Amici are physicians, educators, social workers, substance abuse treatment providers, and child advocates. No less than the Petitioners in this case, we are profoundly concerned about the harm that substance abuse can wreak in the lives of young people. *See, e.g.,* Am. Acad. of Pediatrics ("AAP") Comm. on Substance Abuse, *Testing For Drugs of Abuse in Children And Adolescents*, 98 PEDIATRICS 305 (1996) (AAP recognizes "the abuse of psychoactive drugs as one of the greatest problems facing children and adolescents and condemns all such use"). *Amici* have witnessed firsthand the tragic consequences of youth substance abuse, and many of us devote our professional lives to understanding addiction, preventing substance abuse, and working to help troubled young people.

While *Amici* are sympathetic to the impulse to "do more" against illicit drugs that attracts parents and school boards to measures like the one at issue here – and we recognize that this Court has held that public school officials are not disabled from using school-based drug-testing in response to an "immediate crisis" situation, *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 663 (1995) – we are concerned that such practices not become (as they surely will, if this one receives the Court's blessing) a first resort.

For reasons we explain herein, our experience – and a broad body of relevant research – convinces us that a policy like Tecumseh's *cannot* work in the way it is hoped to and will, for many adolescents, interfere with more sound prevention and treatment processes. Under such circumstances, the undeniably weighty interests in promoting and protecting adolescent health counsel judicial invalidation, not approval.

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[*]The parties have consented to the filing of this brief. It was not authored in any part by counsel for a party, and no one other than *Amici* and their counsel made a monetary contribution for its preparation or submission.

Preliminary Statement

At issue in this case is a policy that denies the benefits of participation in a broad range of non-athletic extracurricular activities to students who refuse to submit to school-administered suspicionless urine-testing and to individuals whose urine tests positive for certain drugs of abuse. J.A. 193-205. The record makes clear that the targeting of extracurricularly involved students was ***not*** the result of a School Board determination that (a) those students were *particularly likely* to use the substances tested for, *see, e.g.*, J.A. 101, 119, 127; (b) that the population covered was in greater need of deterrence than were other students; or (c) that the school's already-existing anti-drug policies, *see, e.g.*, Pet. Br. at 7, were not succeeding in preventing abuse – the District repeatedly represented that the tested-for substances were "not * * * a major problem." *See* J.A. 180. Nor did the safety considerations so energetically stressed in litigation, *see, e.g.*, Pet. Br. at 43, figure in the Policy's adoption. J.A. 155.

Rather, as the record and decisions below document, the Policy's genesis was in demands that the School Board do more about perceived student drug use, J.A. 85-8, and the decision to require urine tests from extracurricular participants stemmed from (1) desire to be "fair" to the initially targeted population – student-athletes – by providing that others would be tested, as well, J.A. 89, and (2) advice of counsel that the District would have a freer hand testing a subgroup whose submission was tied to involvement in "voluntary" school activities. J.A. 155.

These facts make the case extraordinary in Fourth Amendment jurisprudence. Although individualized suspicion is not an irreducible constitutional requirement, the Court's cases treat some quantum of suspicion as presumptively necessary – subject to a showing that a suspicion-based

approach will not work, *see Chandler v. Miller*, 520 U.S. 305, 318-19 (1997) – and never have permitted a policy targeting large numbers of individuals for intrusive searches for no better reason than that doing so might make searches of *other individuals* seem less unfair. *See National Treas. Employees Union v. Von Raab*, 489 U.S. 656, 681 (1989) (Scalia, J., dissenting) ("the impairment of individual liberties cannot be the means of making a point").

As such, this Policy should not withstand even a cursory Fourth Amendment examination, let alone the "careful[]" one the governing case law prescribes. *Chandler*, 520 U.S. at 314. In fact, as we show below, the necessary "context-specific" scrutiny, *id.*, discloses defects in this Policy that are more serious than found with measures rejected as merely "symbolic" by this and other courts. Unlike cases involving minor, but gratuitous, intrusions on privacy – which *Chandler* established as constitutionally "unreasonable," 520 U.S. at 318 – the Policy at issue here operates, in key respects, at cross purposes with the important objectives cited in its defense.

Summary of Argument

Amici do not part company with Petitioners in their appraisal of the health dangers that illicit drugs pose to young people or of the importance of preventing and treating youth addiction.[1] But precisely because what is at stake is so important, we believe that adult decision makers – parents, doctors, school boards, and courts – have a special obligation to promote policies that *realistically* promise to help young people

---

[1]Several of *Amici* have adopted formal resolutions addressing youth substance abuse. *See, e.g.*, APHA Policy Statement 8817, *A Public Health Response To the War on Drugs: Alcohol, Tobacco & Other Drug Problems Among the Nation's Youth*; NEA Resolution C-3 (2001).

– and to resist measures, however well-intentioned, that are inconsistent with that objective.

Amici are concerned that the Policy at issue in this case fits the latter description. Experience teaches that whether a particular prevention approach will work depends critically on the perceptions and responses of its adolescent subjects, and involuntary, school-based urine-testing regimes of the sort at issue – because they are experienced as intensely intrusive and distrustful – are especially unlikely to work as intended.

The distinctive feature of the Policy at issue here – linking drug screening to participation in student extracurricular activities – does not allay these concerns. That qualification does little to limit the Policy's reach: such activities are a central part of the school experience, and students in Tecumseh and elsewhere participate at high rates. Nor is it one that makes intuitive sense: there is, on the contrary, a demonstrated, strong association between student extracurricular involvement and *abstinence* from drugs.

More important, there is growing recognition that extracurricular involvement plays a role in ***protecting*** students from substance abuse and other dangerous health behaviors. A policy that conditions participation on submission to an in-school urine testing regime not only risks denying those benefits to students who, out of principle or modesty, refuse to submit, but it is disproportionately likely to discourage "marginal," higher risk students – whose attachment to school is weakest, but who are in greatest need of protection.

Nor may it simply be assumed that the threat of detection through urinalysis will translate into decreases in unhealthy behavior even among those who *do* opt to participate in the covered activities. Policies like Tecumseh's leave open a third option: to continue extracurricular involvement, but to shift

from unhealthy behavior that the test might detect to abuse of substances it is unlikely to. Whether such shifting occurs as a result of sincere misunderstanding – *e.g.*, mistaken belief that substances not tested for, such as alcohol and tobacco, are less unhealthy than "illicit" drugs – or of more conscious defiance of the District's decision to "catch" its students, it seriously compromises any preventative effect.

Tecumseh's Policy should not be sustained as "treatment" either. Whether Petitioners are right to label it "non-punitive," the "consequences" the Policy does impose – exclusion from extracurricular activities and disclosure of the student's problem to those in the school environment deemed "need[ing] to know" – are still likely to toughen the already daunting challenge of recovery from substance abuse. Indeed, by placing the student's activity supervisor at the front lines of Policy enforcement, the District may close down what might otherwise be an important avenue of support for a young person seeking to turn away from drug involvement.

This points toward a final, far-reaching defect of the Policy. It injects the school and its personnel, unnecessarily, into a realm where parental and medical judgment should be preeminent. Unlike the policies upheld in cases claimed as precedent, *see Vernonia*; *New Jersey v. T.L.O.*, 469 U.S. 325 (1984), this Policy is anchored less in the school's core responsibilities for student safety and the integrity of the instructional process, than in a more generalized sense of concern for students' health problems.

Such concern, to be certain, is legitimate. Schools can and do play a pivotal role in promoting young people's health. But when school boards seek to advance these more general interests, they must seek to do so in ways that support, rather than undermine, the judgments of students' parents and doctors.

Tecumseh's Policy has, for no sufficient reason, disturbed this allocation of responsibility. The Policy operates in disregard for prevention and treatment principles that doctors and substance abuse experts view as fundamental, and it denies those parents who *want to* take primary responsibility for discouraging, punishing, and treating substance abuse – and not delegate that job to the School Board – the freedom to do so.

I. The Educational And Developmental Context Highlights The Policy's Constitutional Defects

This case concerns a Policy linking in-school urine testing to extracurricular involvement – an approach defended as needed to prevent adolescent substance abuse. As such, it fairly implicates precedents recognizing that high school students – and adolescents generally – are *different* from mature adults in ways that can be of constitutional dimension, *see, e.g., Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986); *Ginsberg v. New York*, 390 U.S. 629, 638 (1968); *Ohio v. Akron Center for Repro. Health*, 497 U.S. 502, 520 (1990).

But Petitioners mistake the import of that principle and its significance for this case. While such differences have figured in cases rejecting constitutional rules that might impair public schools' discharge of day-to-day instructional responsibilities, *see Fraser*; *T.L.O.*; *Ingraham v. Wright*, 430 U.S. 651, 662 (1977), the Court has never embraced the general "relaxation" of scrutiny that Petitioners seek, Br. at 17. On the contrary, its cases acknowledge that school board majorities, no less than other governmental bodies, can threaten constitutional rights, *see West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943), and that meaningful *protection* of those rights *also* requires taking account of the distinct capacities, experiences, and perceptions of adolescents, *see, e.g., Edwards v. Aguillard*, 482 U.S. 578, 584 (1987); *Lee v. Weisman*, 505 U.S. 577,

592-93 (1992).

A sensitive appreciation of the educational and developmental context, we believe, strongly reenforces the correctness of the Appeals Court's constitutional judgment here. The private interests against Tecumseh's Policy become weightier and its claimed benefits, more unlikely, when considered in light of the known realities of how adolescents benefit from school activities, how they are drawn toward (and protected from) substance abuse, how they perceive and respond to school policies – and how can adolescents differ from one another in these respects. *Cf.* J. Schulenberg, *et al.*, *Development Matters* in ADOLESCENTS, ALCOHOL & SUBSTANCE ABUSE 44 (Monti, *et al.*, eds., 2001) ("alcohol and other drug use among young people is embedded within the many developmental transitions that take place during adolescence and the transition to young adulthood").

II. Extracurricular Involvement Is Broadly Beneficial And Is A "Protective Factor" For Adolescents At Particular Risk of Substance Abuse

A. Young People Derive Important Benefits From Extracurricular Participation

It would be unwise to "minimiz[e] the importance to many students of * * * participating in extracurricular activities," *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 311 (2000), or "the significant place extracurricular opportunities have in the growth of [the Nation's] high school students." Pres. Proc. No. 5109, 48 Fed. Reg. 44,749 (Sep. 27, 1983).

In surveys, students regularly single out extracurricular activities as a particular source of satisfaction. *See* J. Eccles & B. Barber, *Student Council, Volunteering, Basketball, or Marching Band: What Kind of Extracurricular Involvement*

Matters?, 14 J. ADOLESCENT RES. No. 1 at 10, 19 (1999); P. Winne & J. Walsh, *Self-Concept And Participation In School Activities Reanalyzed*, 72 J. EDUC. PSYCH. 16 (1980). Indeed, "[s]tudents participating in a number of activities * * * express greater satisfaction with the *total high school experience* than students who do not participate," Nat'l Fed. of State High School Ass'ns, *The Case For High School Activities* at 5 ("*Case For Activities*") (emphasis added).

Moreover, "many students * * * wish to pursue post-secondary educational training and/or professional vocations requiring experience [that can be] garnered *only* by participating in extracurricular activities," *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1109 (Colo. 1998) (emphasis added). And students – and parents – are acutely aware of another tangible benefit: a strong record of extracurricular involvement is all but essential to securing admission to a competitive undergraduate college.

But the beneficial effects of extracurricular participation extend beyond the ones most immediately apparent. As President Reagan highlighted, participants:

> gain key insights into the roles which competition and cooperation play in our society. Moreover, these experiences help students to learn to set and achieve goals, to organize their time effectively, and to enhance the social skills that are needed to enjoy and succeed in life.

48 Fed. Reg. at 44,749.

Empirical research confirms that students who participate in extracurricular activities are more likely to stay in school, earn higher grades, and to set – and achieve – more ambitious educational goals. *See* Eccles & Barber, *supra*, at 25 (finding "clear evidence" that participation in extracurricular activities

produces higher than expected GPAs); J. Mahoney & R. Cairns, *Do Extracurricular Activities Protect Against Early School Dropout?* 33 DEV. PSYCH. 241 (1997) (yes); F. Newman, *et al.*, *The Significance And Sources of Student Engagement* in STUDENT ENGAGEMENT AND ACHIEVEMENT IN AMERICAN SECONDARY SCHOOLS (F. Newman ed., 1992); NAT'L CTR. FOR EDUC. STATS., EXTRACURRICULAR PARTICIPATION & STUDENT ENGAGEMENT (1995).

Finally, these benefits have been found to be enduring. A study conducted by the American College Testing Service concluded that the factor that best predicted success and later life satisfaction (more than school grades or scores on standardized tests like the ACT) was participation in high school activities. *Case For Activities* at 5; *see also* M. Glancy, *et al.*, *Adolescent Activities And Adult Success and Happiness: Twenty-Four Years Later*, 70 SOC. & SOC. RES. 242 (1986).[2]

The many positive outcomes associated with extracurricular participation resonate with broader understandings of the defining challenges and tasks of adolescent development. Thus, because extracurricular pursuits are freely chosen, they can play a benign role in the normative adolescent process of "trying out" identities. *See* Eccles & Barber, *supra* at 30. And activities enable young people to take on greater individual responsibility, to strengthen bonds with like-minded peers, *id.* at 29, forge relationships with caring adults, and strengthen self-esteem.

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[2] *Accord* L. Otto, *Extracurricular Activities in the Educational Attainment Process*, 40 RURAL SOC. 162 (1975); L. Otto, *Extracurricular Activities in the Status Attainment Process*, 41 RURAL SOC. 217 (1976); S. Lamborn, *et al.*, *Putting School in Perspective: The Influence of Family, Peers, Extracurricular Participation & Part-Time Work On Academic Engagement*, in STUDENT ENGAGEMENT, *supra*.

Values and habits inculcated in extracurricular involvement are, broadly speaking, "prosocial" – and readily applied in other spheres. Thus, those who involve themselves in high school activities come to define success in ways that are "conventional" – *i.e.*, fundamentally consistent with how their schools, parents, and broader adult society do.

B. Participants Are Far Less Likely To Use Alcohol, Tobacco Or Other Drugs Than Are Less Involved Peers

A fair reading of the record in this case indicates that substance abuse by the students subject to the Policy is exceedingly rare, *see* 242 F.3d at 1273 – and almost certainly less common than among students who are not tested. J.A. 119.

Research establishes that Tecumseh is, in this respect, representative. Nationwide, students who participate in extracurricular activities are significantly less likely to develop substance abuse problems than are their less-involved peers. *See* N. Zill, *et al., Adolescent Time Use, Risky Behaviors and Outcomes* (U.S. Pub. Health Serv. 1995) ("students who reported spending no time in school-sponsored activities were 49 percent more likely to have used drugs"); L. Shilts, *The Relationship of Early Adolescent Substance Use to Extracurricular Activities, Peer Influence, and Personal Attitudes*, 26 ADOLESCENCE 613, 615 (Fall 1991) (finding that among adolescents studied, "the non[drug]using group reported significantly higher involvement in extracurricular activities as compared to the using and abusing groups").[3]

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[3] *Accord* M. Resnick, *et al., Protecting Adolescents From Harm: Findings From the National Longitudinal Study on Adolescent Health*, 278 JAMA 823, 828-30 (1997) (finding that higher levels of connectedness to school were associated with less frequent alcohol and marijuana use).

C. Extracurricular Involvement Plays An Important, Protective Role

Amici do not doubt that these dramatic differences can be attributed – in part – to processes of self-selection. It is increasingly understood that the risks of substance abuse are not uniformly distributed across the adolescent population, R. Jessor, *New Perspectives on Adolescent Risk Behavior* in NEW PERSPECTIVES ON ADOLESCENT RISK BEHAVIOR 3-5 (R. Jessor, ed., 1998) (summarizing research identifying biological, psychological, family and social factors that contribute to risk of drug involvement), and it is entirely plausible that young people who are already well protected from substance abuse are the same ones who are more likely to join in school-based activities. But, we would note, recognizing these differences hardly buttresses Petitioners' Policy: to acknowledge that extracurricular participants are *less likely* to become involved in substance abuse would not seem an argument *in favor* of a policy that tests *only* students who fall in that category.[4]

But it is also clear that self-selection is not a complete explanation. Many individuals with multiple "risk factors" do

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These findings extend to other problem behaviors. Zill *et al.* found students uninvolved in school-sponsored activities were also 57 percent more likely to drop out, 37 percent more likely to have become teen parents, 35 percent more likely to have smoked cigarettes, and 27 percent more likely to have been arrested. Notably, a number of researchers have found one class of school activities to be *positively* correlated with one unhealthy behavior: high school *athletes* use *alcohol* more – and more heavily – than do peers. *See*, e.g., Zill, *et al.*

[4] *Cf.* D. Elmquist, *Alcohol And Other Drug Use Prevention For Youths At High Risk And Their Parents*, 18 EDUC. & TREATMENT OF CHILDREN, No. 1 (1995) (prevention efforts that focus "on generic youths and their parents * * * divert[] badly needed resources from a small but at-risk target group to a larger but relatively healthy general population").

not become involved with alcohol or drugs, and there is mounting empirical support for the conclusion that extracurricular participation plays an independent, "protective" role – especially for students who are at higher risk. *See, e.g.*, L. Steinberg & S. Avenevoli, *Disengagement From School*, in NEW PERSPECTIVES, *supra* at 420; M. Ensminger & H. Juon, *Transition To Adulthood Among High-Risk Youth* in *id.* at 387.[5]

The most obvious way that extracurricular activities protect vulnerable adolescents is simply by extending the time spent under adult supervision. *See* C.A. App. 519 (Board President's testimony that "if [students] are kept busy with activities from school they don't have as much time on their hands to go and mingle and drive up and down the street"). But while the *nature* of this effects need no elaborate explanation, its full significance is probably less well appreciated.

As a 1992 Carnegie Corporation study entitled A MATTER OF TIME: RISK AND OPPORTUNITY IN THE NONSCHOOL HOURS documented, fully *40%* of adolescent waking hours are "discretionary," *i.e.*, not committed to school, homework, employment, or chores, and subsequent research has highlighted the vastly disproportionate incidence of adolescent drug use and other dangerous behavior during the unsupervised hours between the end of classes and parents' return home in the evening. *See* U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, "SAFE AND SMART": MAKING AFTER-SCHOOL HOURS WORK FOR KIDS (1998) (collecting research on disparate rates of drug use, cigarette smoking, violence, and vandalism

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[5] *See also* D. Davalos, *et al.*, *The Effects of Extracurricular Activity, Ethnic Identification and Perception of School on Student Dropout Rates*, 21 HISP. J. BEH. SCI., No. 1 at 61 (1999) (Mexican-American students involved in nonathletic extracurricular activities are 2.3 times more likely to stay in school than those not involved).

occurring during this time period). Providing structured, positive activities that – like Tecumseh's band, choir, and academic team – meet during those hours appreciably lowers risk. *See* Nat'l Inst. on Out-of-School Time, *Fact Sheet on School-Age Children's Out-of-School Time* (March 2001).

But the mere fact of timely adult supervision is not the only way that extracurricular involvement is protective. As noted above, by joining an extracurricular activity, students affiliate with peers who themselves tend to be more secure and motivated, and come to know faculty members in a less formal setting than the typical classroom. These positive social supports and networks play a critical role in periods of heightened stress. Eccles & Barber, *supra* at 29 ("over time, the coalescence of one's personal identity, one's peer group, and the kinds of activities one participates in * * * can shape the nature of one's pathway through adolescence"). Achievement of extracurricular success can be an important source of confidence and positive self-concept, *see* R. Cook, *The Alternatives Approach Revisited: A Biopsychological Model and Guidelines and Application*, 20 INT'L J. OF THE ADDICTIONS, No. 9 at 1399 (1985), and participation helps to internalize values, attitudes, and habits that make antisocial behaviors less attractive. *See* Steinberg & Avenevoli, *supra*, at 420.

III. A Policy Like Tecumseh's Will Operate, Unjustifiably, To *Deny* Important Benefits And Anti-Drug Protections

The premises of Petitioners' defense of the Policy are straightforward: (1) that students – precisely because they value extracurricular activities so highly – will choose the participation-with-drug-testing option (rather than the alternative, "dropping out" of the choir or academic team); (2) that the threat of detection will steer participants away from

unhealthy behaviors; and (3) that the students whose use is detected will benefit from the interventions provided for. Careful examination, however, casts doubt on each of these assumptions.

A. Many Students Find Testing Policies Intensely – Or Intolerably – Intrusive on Privacy

As already discussed, for the overwhelming majority – perhaps all – the individuals to whom Tecumseh's Policy applies, any constitutional "balancing" would be literally one-sided. There is no evidence that the students targeted were in need of the interventions that ensue from testing positive under the Policy or of any deterrent beyond those already in place. But to the extent that there is any public interest on the District's side of the "balance," it is critical that the full magnitude of the countervailing, student interests be accurately appraised. *See Vernonia*, 515 U.S. at 661 (asserted government interest must be "important enough to justify the particular search at hand").

Careful appraisal is especially necessary here, because the Policy's privacy intrusion operates in two distinct ways. Not only does it represent the price exacted from *every* student who decides *to proceed* with participation in the covered activities, but it also raises the prospect that some students will, based on that cost, opt not to – thereby missing *both* the benefits of extracurricular participation *and* whatever advantages Petitioners claim for their drug-testing regime.[6]

1. The Urine Collection Is Itself A Significant Intrusion

[6]Although these latter effects, strictly speaking, may belong (as debits) on the "public interest" side of the constitutional ledger, their Fourth Amendment significance is beyond question. *Chandler*; *Ferguson v. City of Charleston*, 121 S. Ct. 1281, 1289 n.14 (2001).

Although the protocols for urine collection in this case are not fundamentally different from those used in *Vernonia*, many adolescents, we believe, would take issue with the conclusion that the impact of a regime like Tecumseh's on their privacy interests is "not significant." 242 F.3d at 1276.

First, unlike the student athletes in *Vernonia*, the students affected by these policies – debaters, future farmers and choir members – have no less an expectation of bodily privacy than do fellow students who do not participate in competitive extracurricular activities. No physical examinations are required in connection with participation in these activities, J.A. 196, nor does participation entail the sort of surrender of privacy associated with the athletic locker room.[7]

For young people who are not inured, as many student-athletes are, to routine "communal undress" (in the presence of coaches, as well as peers), 515 U.S. at 657, procedures of the sort Tecumseh uses can be intensely uncomfortable. As this

[7]The analogy to administrative inspections of regulated businesses, *see New York v. Burger*, 482 U.S. 691 (1987), which held reasonably well in *Vernonia*, makes no sense here. A defining feature of those searches is that they are necessary to serve the specific purpose that led to regulation in the first place, *see* 482 U.S. at 704 – just as many of the rules governing school *athletic* competition deal with participants' physical health and safety. But even if Future Farmers or Future Homemakers could be described as "closely regulated"– in the sense that participants are subject to more rules than other students – nothing in the relevant "regulatory" regimes would diminish a participant's expectation of *bodily* privacy.

This Court's unconstitutional conditions cases teach a similar lesson: "the government may not require a person to give up a [property] right [in exchange for a] discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *see also Indianapolis v. Edmond*, 531 U.S. 32, 42-43 (2000); *Weisman*, 505 U.S. at 595.

Court has recognized, the act of urination is one that society treats as quintessentially private: urination in public is the subject of almost universal social disapproval and legal prohibition; urine is treated as waste, to be promptly disposed of; and even among mature adults, the subject is referred to, euphemistically, if at all. *Skinner v. Railway Labor Execs. Ass'n*, 489 U.S. 602, 617 (1989).[8]

Moreover, although it is undeniable that "the normal sounds of urination," J.A.199, may be overheard by others in a public restroom, it is neither common nor acceptable for other rest room users to stand outside the stall listening intently, as do monitors here, for those sounds. *See, e.g., Harkey v. Abate* 346 N.W.2d 74, 76 (Mich. App.1983); *see also Bond v. United States*, 529 U.S. 334 (2000) (finding intrusion on legitimate privacy expectation when government agent's physical manipulation of defendant's luggage "far exceeded the casual contact * * * expected from other passengers"). Indeed, for a substantial number of American *adults*, even use of a public restroom in the presence of others who are there entirely for their own reasons is a difficult and acutely stressful experience. R. Kessler, *et al.*, *Social Phobia Sub-Types In The National Co-Morbidity Study* (Harvard Medical School 1997) (estimates of incidence of aversion pareusis); *see also Lopez*, 963 P.2d at 1100 (noting instance of student who "tried five, six, seven times, * * * but could not urinate into the container because he was embarrassed to do so").[9]

While medical offices are an exception to the practice of

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[8] *See also* C. Fried, *Privacy*, 77 YALE L.J. 475, 487 (1968) ("in our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self esteem").

[9] *See generally* S. SOIEFER, ET. AL., SHY BLADDER SYNDROME (2001).

promptly disposing of urine once excreted, medical specimen collection occurs against a background – absent here – of developed patient privacy expectations and professional norms. *See Ferguson*, 121 S. Ct. at 1289. Morever, even in doctors' offices, steps are taken to avoid patient embarrassment. *See generally* S. SORRENTINO, MOSBY'S TEXTBOOK FOR NURSING ASSISTANTS (4th ed. 1996). There is no face-to-face discussion concerning the temperature or clarity of the sample.

The sense of anxiety and shame that many mature adults feel are experienced far more keenly by students subject to procedures like Tecumseh's. Many adolescents are particularly uncomfortable about their developing bodies and intimate bodily functions. A. Peterson & B. Taylor, *The Biological Approach to Adolescence: Biological Change and Psychological Adaption*, in HANDBOOK OF ADOLESCENT PSYCHOLOGY 117, 144 (J. Adelson ed., 1980); S. Harter, *Causes and Consequences of Low Self-esteem in Children and Adolescents* in SELF-ESTEEM: THE PUZZLE OF LOW SELF-REGARD 87 (R. Baumeister ed., 1993) (research finding body image is strongest unique predictor of overall feelings of adolescent self-worth).

And the individual whom the Policy charges with conducting the test – including confronting the student with the warmth and clarity of her sample – is not an anonymous medical professional: it is a teacher or coach – a familiar adult who may well play a powerful authority role in the student's daily school experience. *Compare* 115 F. Supp. 2d at 1291 n.39 *with Von Raab*, 489 U.S. at 661 (independent contractor collected urine) and *Skinner*, 489 U.S. at 609, 626-27 (urine collected at "independent medical facility," by personnel "unrelated to the railroad employer").

Feelings of unease can be intensified, finally, by the public

way in which testing is conducted. In Earls's case the announcement that particular students were to be tested was made to a large assembled group and met with "giggl[ing] and snicker[ing]." 115 F. Supp. 2d at 1291 n.38; *cf. Fraser*, 478 U.S. at 678 (noting that some students "hooted and yelled" at lewd speech, while others "appeared to be bewildered and embarrassed"). This, too, is without analogue in the medical office setting.

2. Students' Privacy Concerns Extend Beyond The Collection Process

Another aspect of the Policy is likely deepen students' apprehension. As part of their "consent" to testing, the Policy requires the student to list prescription medications she has recently used. J.A. 205. The sort of information such a list might disclose – relating to subjects such as treatment for depression, hyperactivity, HIV, and sexually transmitted disease – is precisely the kind that carries strong stigma in the school environment and about which young people affected often feel shame. *See, e.g.*, A. Crocker, *et al.*, *Supports for Children with HIV Infection in School: Best Practices Guidelines*, J. SCH. HEALTH 64, 32-34 (1994).[10]

Although the Policy provides that this information will be treated as confidential, the possibility that *anyone* in the school environment might come to learn such information is an unsettling one. *See* Crocker, *et al.* (recommending that "few, if any, school personnel should receive information about a

[10]The Policy also requires that a student's *parents* "confirm" the medications she lists when giving the sample. J.A. 199. But in Oklahoma and many other States, minors are entitled to obtain treatment for sexually transmitted diseases and other serious, but potentially embarrassing, medical conditions without parental notification or consent. OKLA. STAT. 63 § 1-532.1.

student's HIV status" and stressing that decision to inform school concerning student's HIV status should rest with student and parents); *compare Von Raab*, 489 U.S. at 672 n.2 ("an employee need not disclose personal medical information to the Government unless his test result is positive, and even then any such information is reported to a licensed physician").

Moreover, even a pledge of confidentiality cannot eliminate the *risk* (and fear) that the information will be disclosed inadvertently, *see* J.A. 129-32 (evidence that choir teacher looked at students' prescription drug lists and left them where other students could see them) -- or that, in a community of Tecumseh's size, intimate information about the young person's medical or mental health will make its way "all over town." *Cf.* J.A. 85-88 (School Board President's description of her conversations at local supermarket).

B. Students Will Be Deterred From Extracurricular Involvement, With Far-Reaching, Negative Consequences

Some students, to be sure, will experience even these intrusions and privacy risks as untroubling – and others will make the judgment that valued extracurricular activities are worth what they perceive to be a high price. But, both the evidence in this case, *see* 115 F. Supp. 2d at 1291 n.38, and a broader body of research concerning adolescent attitudes strongly suggest that, under policies such as Tecumseh's, a significant number of students will respond by choosing not to participate.[11]

[11]In its Brief, Tecumseh dismisses students uncomfortable with these intrusions as "'bashful,'" *id.* at 34 (quoting *Vernonia*, 515 U.S. at 657), and asserts, as if the proposition were self-evident, that activities such as Future Homemakers and academic team are "not for [them]."

To the extent that these students are as plaintiff Earls seems to be – young people with "nothing to hide," by way of substance use, but whose principles or personal sense of modesty nonetheless make the testing regime intolerable – the losses are obvious enough.[12] Such students, who need no further deterrence, let alone treatment – are denied the benefits catalogued above. They are cut off from school friends who share their interests; they may find themselves the subject of suspicion or rumor concerning what the screens would have revealed; and their candidacies for admissions to competitive college will almost certainly be prejudiced. *Cf. Weisman*, 505 U.S. at 595 ("absence [from graduation] would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years").

Perhaps worse still, there is good reason for concern that the students most likely to exercise the option not to participate will be those at the "margins" – whose interest in extracurricular activities may be tentative and undeveloped, and who are more likely to have (or feel they have) something to conceal from their peers and teachers. For example, among the adolescent populations who are considered at particular risk for substance abuse are young people suffering from depression, *see, e.g.*, E. Deykin, *et al.*, *Adolescent Depression, Alcohol and Drug Abuse*. 76 AM. J. PUB. HEALTH 178 (1987), and those with substance abuse problems in their family background, *see, e.g.*, D. Baumrind, *Familial Antecedents of Adolescent Drug Use*, in ETIOLOGY OF DRUG ABUSE: IMPLICATIONS FOR PREVENTION (U.S. Dep't. H.H.S. 1985). But as we have explained, it is precisely these students for whom the benefits – and protections – of extracurricular programs are most valuable. *See* Steinberg

[12] At her deposition, Earls testified that she did not know what the substances tested for even look like. J.A. 108.

& Avenevoli, *supra*, at 420 (finding that "youngsters who reported a relatively fragile orientation toward school * * * are * * * significantly more likely to use drugs and alcohol").

In this regard, one specific subpopulation should be of particular concern: young people who have already had problems with substance abuse and are in recovery. It is a telling reminder of how unusually *minor* Tecumseh's experience with drug abuse is that the Policy's effect on such students apparently was not considered.

For such students, for whom low self-esteem and weak connection to school are often critical problems, *see* D. Wasson & M. Anderson, *Chemical Dependency and Adolescent Self-Esteem*, 1995 CLINICAL NURSING RES. 274, the potential benefits of extracurricular involvement are substantial. *Cf.* J. Nation & J. Benshoff, *Therapeutic Recreation Programs for Adolescents in Substance Abuse Treatment Facilities* 62 J. REHAB. 10 (Oct. 1996). But young people recovering from substance abuse will be most unlikely to run a gauntlet like the one erected here. Not only are they less likely to have friends already involved in activities, but adolescents who have been through treatment are very conscious of the likelihood of relapse, *see* J. Baer, *et al.*, *Linking Etiology & Treatment*, in NEW PERSPECTIVES, *supra*, at 201 (summarizing studies finding high rates of relapse among adolescents), and to the extent that they have successfully kept past troubles with alcohol or drugs from peers and teachers, the prospect of airing their problems in the school setting is likely to be an especially daunting one.[13]

[13] *See* AAP Comm. on Substance Abuse, *Indications for Management and Referral of Patients Involved in Substance Abuse*, 106 PEDIATRICS 143, 146 (July 2000) ("Relapse is an expected part of recovery").

IV. The Policy Is Ill-Suited To The Public Health Purposes Claimed For It

A. Drug-Testing Regimes Like Tecumseh's May Not Lead To More Healthy Behavior

In this Court, the District and its *Amici* have striven to defend Tecumseh's policy as preventative *in effect*. Whether or not the District has real substance abuse problems – and even if the Policy actually was adopted for reasons that are symbolic, rather than special – it is argued, such policies are needed to prevent the *onset* of an "epidemic" of unhealthy behavior of the sort described in *Vernonia*, *see* 515 U.S. at 663. No record evidence is identified to support these claimed preventative benefits, and there are important reasons why Petitioners' confidence in them is likely misplaced.

First, although lawyers, we recognize, often reflexively discount problems of under-inclusion, *see Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955), it is troubling, from a public health perspective, that Tecumseh's Policy omits – for practical reasons – any screen for the two substances that *it has attested* are its students' most serious problems: alcohol and tobacco. *See, e.g.*, J.A. 176 (1996-97 report that "the use of tobacco and alcohol continue to be our number one problems"); *cf. Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 190 (1999) (concluding that regulatory regime "pierced by exemptions and inconsistencies" does not "materially advance" government's interest).

The harms associated with adolescent alcohol and tobacco use have been at least as extensively documented as for those drugs for which Tecumseh does screen. *See* PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL (1994); AAP Comm. on Substance Abuse, *Alcohol Use And Abuse, A Pediatric Concern*, 108 PEDIATRICS

185 (July 2001). Indeed, the evidence shows not only that nicotine is highly addictive – meaning that youthful experimentation *typically* leads to life-long unhealthy behavior – but that individuals who manage to avoid cigarette smoking in their teens are highly unlikely ever to begin. SURGEON GENERAL'S REPORT at 67. The consequences of adolescent alcohol ingestion – by far the most widespread of all youth substance abuse problems – can be even more tragic and irreversible. *See* Centers for Disease Control, *Mortality Trends, Causes of Death And Related Risk Behaviors Among U.S. Adolescents* (1993).[14]

The risk that the Policy will be understood to signal that alcohol and tobacco are of lesser danger is not an idle concern. Both products are legal for adult consumption, and parents (and teachers) are far more likely to use those substances than the drugs of abuse for which Tecumseh tests. *See* D. Kandel, *Persistent Themes and New Perspectives on Adolescent Substance Abuse* in NEW PERSPECTIVES, *supra* at 50 (adolescents whose mothers smoke one pack a day are nearly eight times more likely to smoke – 46% vs. 5.9% – than children of non-smoking mothers). Indeed, a central challenge of youth tobacco and alcohol prevention efforts is to overcome the misperception that such substances are not as serious a health concern as substances prohibited to all. "For this reason, prevention specialists and drug educators, including many in government have begun to use the term '*alcohol, tobacco, and other drugs.*'" R. WILSON & C. KOLANDER, DRUG ABUSE PREVENTION 5 (1992) (citing Office of Substance Abuse Prevention, "Editorial Guidelines").

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[14]Thus, the federal statutory provision cited as supplying the "interest of the United States" in this case seeks "'to combat illegal alcohol, tobacco, and drug use.'" U.S. Br. at 1 (quoting 20 U.S.C. § 7116(b)(2)(C)).

But even if the school set out to counteract this impression, by disseminating information stressing the dangers of alcohol and tobacco use, the *design* of the Policy – attaching negative consequences to marijuana, but not alcohol, use – still leaves students who are inclined toward unhealthy behavior an obvious option: they may participate in extracurricular activities, pass the drug screens, and continue to "experiment" *with alcohol*. Indeed, this strategic response is an especially realistic danger: while marijuana and other illegal substances must be purchased from drug dealers, whose conduct is subject to detection by school and law enforcement officials, alcohol is widely available in stores and students' homes. *See* Resnick, *et al.*, *Protecting Adolescents* 278 JAMA at 831 (finding that ready availability increases likelihood of use).

Finally, adolescent development research points to yet another troubling problem. Although, as already discussed, many students' predominant negative reaction to school drug-testing will be *embarrassment*, others are likely to react with *resentment*. Drug-testing of the kind at issue is perceived – understandably – by many adolescents as an expression of adult mistrust and suspicion. Such perceptions can trigger oppositional behavior – including actions that will enable students to "beat" the test, *i.e.*, defying its drug-use-prevention purpose, while obtaining a "clean" result from the testing laboratory. Unlike marijuana, several of the most physically harmful drugs tested for do not stay in the body long enough to make detection through random urine screening a realistic possibility, J.A. 70, 142, and other widely abused substances, such as "ecstasy" and LSD, are not tested for at all. J.A.71.

B. The Policy Ill Serves The Treatment Needs Of Students Who *Do* Have Substance Abuse Problems

As we noted above, for a policy that purports to deal with

a "real" substance abuse problem, Tecumseh's indicates scant attention to the health needs of students who actually *are* chemically dependent. Whether Petitioners are right that the Policy is undeserving of the "punitive" label, *see* Br. at 8-9 (highlighting inclusion of treatment component and gradual way in which sanctions are imposed), its "consequences" are still more likely to hinder, rather than promote, recovery.[15]

First, neither of the policy's two principal sanctions – forced withdrawal from extracurricular involvement (the one expressly provided for) and public exposure (its near-certain consequence) – can be expected to help a young person who has become chemically dependent to return to healthier behavior. Whether or not an adolescent recovering from a substance abuse problem perceives the full value of extracurricular participation, he is especially likely to *benefit* from the opportunities afforded for structure, supervision, and interaction with drug-averse peers. *See* M. GONET, COUNSELING THE ADOLESCENT SUBSTANCE ABUSER 156 (1994) ("reentry into high school is especially difficult for recovering teenagers * * * *At the very time that they are integrating their new behaviors and new identity into their every day school life, they must face their former drug dealers and closest drug-using friends").

Equally troubling is the second sanction: disclosure of the positive test result to those within the school community. Putting aside the near certainty that the information will become known beyond those individuals denominated as "need[ing] to know" (both through careless discharge of confidentiality

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[15]There surely is tension between Petitioner's insistence that the Policy's adverse consequences are so mild as to not amount to "punishment" and their confidence in its deterrent powers. *Cf. Kansas v. Crane*, 2002 WL 75609 at *4 (2002) (stressing that deterrent purpose is key to distinguishing criminal from remedial regime).

responsibilities and by inference from a student's sudden "disappearance" from chosen pursuits), the disclosures that the Policy expressly contemplates – to coaches and faculty supervisors – are themselves likely to intensify feelings of shame and futility that adolescents facing chemical dependency must manage.

For some students (*e.g.*, those new to the school), the faculty supervisor will essentially be a stranger, low on the list of persons whom the student (or her parents) would choose to share highly sensitive personal health information. In other cases, the supervisor may be a venerated authority figure, whom the student feels ashamed for having disappointed or with whom she would be deeply uncomfortable discussing family or mental health problems that contributed to drug use.

Finally, some students will have very different, closer relationships with the teachers who supervise their extracurricular activities. But the Policy, by casting teachers in the role of front-line enforcers (and sometime specimen collectors) can operate to interfere with the kind of open and honest communication with a supportive adult that is critically important for recovering adolescents.

V. Tecumseh's Policy Does Not Respect The Proper Allocation of Responsibility Among Parents, Doctors And Schools

A. Drug-Use Detection Is Not A Necessary Part of Public Schools' Core Responsibilities

While this Court's decisions express reluctance to interpret the Constitution in ways that interfere with public schools' responsibilities as "guardian and tutor," – to assure the safety of students entrusted to their care and regulate conduct that impairs the teaching process, *see Fraser*; *T.L.O.*– Tecumseh's

Policy does not fit that description. Notwithstanding images conjured of out-of-control cutlery, animals run amok, and colliding tubas, the activities for which testing is imposed are not fairly described as highly safety-sensitive, *compare Skinner* (train operation); *Vernonia* (tackle football), and there is no suggestion here of wholesale behavioral disturbances that might overwhelm the school's ability to maintain classroom order by enforcement of ordinary rules governing student conduct.

To the extent that any misbehavior is believed "drug fueled," *Vernonia*, 515 U.S. at 663, the school has the authority – unchallenged by Plaintiffs – to subject the offending individual to a urine screen, J.A. 198, and the school's many other anti-drug measures, ranging from its rules against possession on school grounds, to preventative education, to the presence of mounted cameras and drug-sniffing dogs, have already, by the District's own estimation, succeeded in keeping any drug problem to minor proportions. J.A. 180.

B. Schools' Pursuit Of Generalized Student Health Objectives Are – And Must Be – More Respectful of Parental And Medical Judgment

In seeking to detect student substance use that *does not* manifest itself in suspicious or prohibited school behavior (and does not arouse the curiosity of the trained dogs), Tecumseh's Policy is better described as resting on a more generalized concern for the health and well-being of its students.

There is nothing illegitimate about a public school's seeking to advance this sort of public health purpose. Indeed, schools play an important and growing role in public health promotion generally, *see* AAP Comm. on School Health, *School Health Assessments*, 105 PEDIATRICS 875 (Apr. 2000), and drug prevention, in particular. But when schools range beyond their traditional realm – and seek to address conduct

that neither occurs nor manifests itself in the school environment, it becomes incumbent that they do so sensitively to the interests and judgment of parents and health professionals.

Indeed, while Petitioners and their *Amici* liken the regime to mandatory immunization laws, *see* Br. at 26; *see also Vernonia*, 515 U.S. at 656 (noting that public schools "provide vision and hearing screening, dental and dermatological checks, and scoliosis screening") – those school-based health measures operate, in relevant respects, strikingly *differently* from the one defended here.

First, while public (and private) school students in Oklahoma and elsewhere must be vaccinated in order to attend school, *see, e.g.*, OKLA. STAT. 63 § 1210.191, those requirements are not imposed *by school boards* on *educational* grounds. They instead reflect *medical* judgments of State health officials. *See id.* ("Board of Health by rule, may alter the list of immunizations required").

Moreover, while schools might – as a matter of convenience – administer vaccinations on-site, parents are free to obtain them from any "licensed physician," *id.*, and, tellingly, even Oklahoma's mandatory-immunization provision is construed to incorporate an exception for when a physician certifies that "immunization would endanger the life or health of the child *or* [t]he parent or guardian * * * submits a written statement objecting to such tests or immunization on *medical, religious or personal grounds*." Op. Atty. Gen. No. 76-293 (Aug. 5, 1976) (emphasis added).[16]

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[16] *See also* Pub. L. 107-110 ("No Child Left Behind Act") § 1061(c)(2)(C)(A)(ii), (C)(iii) (providing parental right to opt out of "any non-emergency, invasive physical examination or screening that is [] required as a condition of [school] attendance").

C. Tecumseh's Policy Fails To Respect Parental Prerogatives And Medical Expertise

Tecumseh's drug testing Policy shows no similar respect for the judgments of doctors and treatment experts – or wishes of parents. The urine screen is administered in school only, under circumstances when testing is considered medically inappropriate, *see generally Testing for Drugs of Abuse* 98 PEDIATRICS at 305-07, and in a manner that departs from professional norms, *id.*, – without regard for the student's or parents' wishes or the medical judgment of his pediatrician. The results – and other medically sensitive information – are shared with individuals with no defined counseling or health responsibility, whose personal connection to the student may be tenuous, and the Policy's choices of substances to test for and sanctions to impose were made without regard for generally accepted substance abuse prevention and treatment principles.

The displacement of *parental* authority is at least as serious and no more justified. Although Petitioners invoke "pleas by parents who know their children are using drugs," Br. at 39, the Policy trammels, rather than vindicates, parental rights. No School Board vote was needed in order for a Tecumseh parent to subject his son or daughter to a random urine test (presumably the District could have offered to conduct such testing on its premises, just as it might offer flu shots) – and nothing prevented a parent from making the judgment that her child's positive test result merited "suspension" from one or all the student's extracurricular activities – or from determining that there were teachers and administrators at the school who would "nee[ed] to know" the results.

Tecumseh's Policy changed this *status quo* in four respects.

It made the school restroom the lone acceptable venue for drug-testing and the school's faculty, the only permissible class of specimen collectors. It imposed a uniform regime of suspension from extracurricular involvement and disclosure to the "need-to- know" group in every instance where a substance is detected, foreclosing any role for individualized, student-specific parental – or pediatric – judgment. It simply overruled the judgments of parents who, for a variety of reasons, would want their children to participate in Tecumseh's extracurricular activities, but *not* its testing and "treatment" regime. Finally, it enabled those parents who *want* their children tested to delegate to school personnel responsibility for doing so and for fixing the "consequences" that would ensue when urine tests positive.

The first three of these changes are unambiguously negative. For the reasons canvassed above, a regime where parents play their ordinary role – with the school maintaining its commendably vigilant enforcement of its conduct regulations – would far better serve the preventative purposes advanced by Petitioner.

To the extent that the fourth – enabling parents to delegate drug prevention responsibility to the school – is a "benefit" in any sense, it is not one deserving positive weight in the public health or calculus. *See, e.g.*, H. Chilcoat, & J. Anthony, *Impact of Parent Monitoring on Initiation of Drug Use*, 35 J. AM. ACAD. CHILD. & ADOLESC. PSYCH. 91 (1996) (parental unwillingness to take primary role *increases* risks of youth substance abuse).

Conclusion

For the reasons stated above, *Amici* request that the Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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Description of *Amici Curiae*

Amicus Curiae American Academy of Pediatrics ("AAP") and its member pediatricians dedicate their efforts and resources to the health, safety and well being of infants, children, adolescents and young adults. The AAP today has approximately 55,000 members in the United States, Canada and Latin America. Members include pediatricians, pediatric subspecialists and pediatric surgical specialists. The AAP pursues its mission through the work of 30 committees and 51 sections, and by means including original research, public education, continuing professional education, and publication. The AAP publishes *Pediatrics*, its monthly scientific journal; *Pediatrics in Review*, its continuing education journal, as well as *Healthy Kids* magazine, manuals on a variety of topics, including school health, and a series of child care books written by AAP members.

Amicus Curiae National Education Association ("NEA"), founded in 1857, is America's oldest and largest professional organization committed to advancing the cause of public education. The NEA has over 2.5 million members who work to improve education at every level, from pre-school to university graduate programs. NEA has affiliates in every State and in over 13,000 local communities across the Nation. At the national level, NEA's work ranges from coordinating innovative projects that will improve the provision of educational opportunities to participating in deliberations about public policies that affect students, teachers, and schools.

Amicus Curiae American Public Health Association ("APHA") is a national organization devoted to the promotion and protection of personal and environmental health. Founded in 1872, APHA is the largest public health organization in the world, representing over 50,000 public health professionals. It

represents all disciplines and specialties in public health. Throughout its history, APHA has been at the forefront of numerous efforts to prevent disease and promote health. The organization publishes the *American Journal of Public Health*, a peer-reviewed journal.

Amicus Curiae National Association of Social Workers ("NASW") is a professional membership organization comprised of 150,000 social workers, with chapters in every State, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and an international chapter in Europe. Created in 1955 by the merger of seven social work organizations, the NASW has as its purpose to develop and disseminate high standards of practice while strengthening and unifying the social work profession as a whole. NASW and its members have a significant interest in policies, such as the one at issue in the present case, that negatively effect children and youth. In NASW's policy on "Civil Liberties and Justice," the Association expressed concern about the unwarranted invasion of privacy that occurs when mandatory drug testing is used as a precondition for the receipt of services for which an individual would otherwise be eligible. The Association believes the negative and chilling effect on student participation in extracurricular activities caused by mandatory pre-participation drug testing requires review and reconsideration.

Amicus Curiae National Association of Social Workers – Oklahoma Chapter ("NASW-OK") is the largest professional association of social workers in Oklahoma. Founded in 1955, it has more than 1,000 members throughout the state. NASW-OK is a member organization that seeks to enhance the effective functioning and well-being of individuals, families, and communities in Oklahoma. Its members, trained professionals with degrees in social work, practice in a wide variety of settings, including public schools. Its members have

extensive experience working with adolescents and addressing health issues, including substance abuse. Its members' experience in the schools and communities of Oklahoma, and working with Oklahoma's young people, gives NASW-OK a well informed perspective on the issues raised in this case. Its offices are in Oklahoma City, Oklahoma.

Amicus Curiae National Council on Alcoholism and Drug Dependence (""NCADD"") is the oldest advocacy organization in this country addressing America's most widely abused drug–alcohol, alone or in combination with other drugs. Founded in 1944, it has a network of 92 affiliates in 28 states. NCADD's mission is to advocate for prevention, intervention, research and treatment, and to reduce the stigma associated with alcoholism and other drug problems by working continuously to change public attitudes and behaviors.

Amicus Curiae Center for Law and Education ("CLE") is a national legal support and advocacy organization representing parents and students in efforts to improve the quality of public education. Since 1969, CLE has pursued this goal through litigation, legislative and administrative advocacy, the provision of technical assistance, and training for attorneys, parents and other advocates.

Amicus Curiae Loyola Child Law Center ("Center") houses the children's law programs at Loyola University Chicago School of Law. The Center offers an extensive interdisciplinary child law curriculum. The Center's Child Law Clinic currently represents over 100 children in cases involving education, child welfare, domestic violence, and other related areas. The Center's Legislative and Policy Program engages in systemic advocacy related to children and families. The Center's faculty train lawyers, social workers and other professionals in pediatric law and child and family advocacy. Faculty are also

involved in numerous conferences and advisory panels aimed at improving the administration of justice for children and families.

Amicus Curiae Lawyers for Children, Inc. ("LFC"), founded in 1984, is dedicated to protecting and promoting the health and welfare of vulnerable children. LFC provides free, integrated legal and social work services to over 4,000 individual children per year, in a variety of legal contexts. In addition, LFC publishes guidebooks and other materials for both children and legal practitioners, conducts professional training sessions, and seeks systemic improvement of systems affecting vulnerable children. LFC staff have consulted to other child-focused organizations throughout the country.

Supreme Court, U.S.
FILED
FEB 6 2002
CLERK

No. 01-332

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY and INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY,
Petitioners,

v.

LINDSAY EARLS and LACEY EARLES, minors, by their next friends and parents, John David and Lori Earls, and DANIEL JAMES, a minor, by his next friend and mother, Leta Hagar,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICI CURIAE* OF PROFESSOR AKHIL REED AMAR, SOUTHMAYD PROFESSOR OF LAW, YALE LAW SCHOOL, AND PROFESSOR VIKRAM AMAR, UNIVERSITY OF CALIFORNIA, HASTINGS SCHOOL OF LAW IN SUPPORT OF RESPONDENTS

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February 6, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

A. The Fourth Amendment's Central Requirement of Reasonableness Is Neither Standardless Nor a Rubber Stamp For Government Action. 3

B. The School Drug-testing Policy Here Is Not Reasonable in Light of All the Circumstances. 9

C. The Circumstances That Made the Vernonia Policy Reasonable Are Absent Here. 16

CONCLUSION 18

TABLE OF AUTHORITIES

CASES **Page**

Atwater v. City of Lago Vista, 121 S. Ct. 1536 (2001) 8

Chandler v. Miller, 520 U.S. 305 (1997) ..... *passim*

City of Indianapolis v. Edmond, 531 U.S. 32, 121 S. Ct. 447 (2000) 12

Illinois v. McArthur, 121 S. Ct. 946 (2001) 4

Lee v. Weisman, 505 U.S. 577 (1992) 14, 15

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 6

McDonald v. United States, 335 U.S. 451 (1948) 7

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) 11

Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989) 11

Sugarman v. Dougall, 413 U.S. 634 (1973) 10

Terry v. Ohio, 392 U.S. 1 (1968) ..... *passim*

Tinker v. Des Moines, 393 U.S. 503 (1969) 12

United States v. Carolene Products Co., 304 U.S. 144 (1938) 10

United States v. Knights, 122 S. Ct. 587 (2001) 4

TABLE OF AUTHORITIES - continued

Page

United States v. Virginia, 518 U.S. 515 (1996) 6

Vernonia School District 47J v. Acton, 515 U.S. 646 (1995) ..... *passim*

Welsh v. Wisconsin, 466 U.S. 740 (1984) 7

Winston v. Lee, 470 U.S. 753 (1985) 7

Zurcher v. Stanford Daily, 436 U.S. 547 (1978) 6

MISCELLANEOUS

Akhil Amar, The Document and the Doctrine, 114 Harv. L. Rev. 26 (2000) 8

Akhil Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757 (1994) 3, 8

Akhil Amar, Terry and the Future: Terry and Fourth Amendment First Principles, 72 St. John's L. Rev. 1097 (1998) 3, 5

Bradford P. Wilson, *Enforcing the Fourth Amendment: A Jurisprudential History* (1986) 4

INTEREST OF *AMICI CURIAE*

Professor Akhil Reed Amar, Southmayd Professor of Law, Yale Law School, and Professor Vikram Amar, University of California, Hastings, School of Law are law professors who teach and write about constitutional law with a special interest in the Fourth Amendment. This brief sets forth their considered view from a scholarly perspective on the issue central to this case: whether the school drug-testing policy imposed by Tecumsah High School on its students is reasonable under the Fourth Amendment. *Amici* join this brief solely on their own behalf and not as representatives of their universities.[1]

SUMMARY OF ARGUMENT

Because the touchstone of the Fourth Amendment is reasonableness, the proper inquiry for this case is whether the monitored drug testing required of extracurricular students is reasonable under the circumstances. That analysis requires consideration of constitutional norms as well as the proportionality and nexus of the test to the government interest. Here, the search and seizure of the person and bodily fluids of a high school student are so intrusive, and the nexus of the test to concerns of safety and deterrence are so tenuous, that the drug-testing policy cannot be sustained. Nor do considerations of democracy or tradition warrant special deference to Tecumsah's unusual policy targeted almost entirely at non-voters. Tecumsah's policy is unreasonable, and thus unconstitutional.

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[1] The Parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part. The DKT Liberty Project contributed money to support the preparation and submission of this brief although the *amici* were not compensated in any way.

ARGUMENT

In 1995, in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), this Court rejected a challenge to a school drug-testing policy that randomly tested athletes, finding that the policy was "reasonable" within the meaning of the Fourth Amendment given the government's justification, the relatively minimal incremental intrusion involved, and – perhaps most importantly – the common sense fit between the government's means and ends. The *Vernonia* Court did not, of course, hold that because one school drug-testing policy is reasonable, *all* school drug-testing policies are reasonable.

Two years later, this Court in *Chandler v. Miller*, 520 U.S. 305 (1997) struck down a Georgia law that required all candidates seeking a place on the statewide ballot to submit to drug testing. The *Chandler* Court, unlike the *Vernonia* Court, did not undertake a comprehensive analysis of the law's overall reasonableness, but instead relied on a categorical presumption against searches lacking in individualized suspicion, and held the Fourth Amendment was violated because Georgia's law did not "fit within the closely guarded category of constitutionally permissible suspicionless searches." *Id.* at 309.

The *Chandler* decision in no way purported to overrule the *Vernonia* case, and indeed cited it for support at various points. *See id.* at 316-17, 319. Nonetheless, there appears to be some methodological tension between the "reasonableness" approach adopted in *Vernonia* (as well as some other recent cases), and the "individualized suspicion" approach reflected by *Chandler*. The present case affords the Court a perfect opportunity to resolve this apparent tension, and in so doing to expound on what we believe to be

the central meaning of the Fourth Amendment's central requirement – that government refrain from searches and seizures that are unreasonable. An honest and careful answer to the reasonableness question here should demonstrate that an overall reasonableness inquiry is no more unstructured than an inquiry focused on warrants, probable cause or individualized suspicion, and indeed can have just as much if not more bite.

A. The Fourth Amendment's Central Requirement of Reasonableness Is Neither Standardless Nor a Rubber Stamp for Government Action.

As we have urged before, the Fourth Amendment means what it says and says what it means:[2]

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

These words read straightforwardly do not invariably require warrants or probable cause or even individualized suspicion for searches and seizures – they simply require that the government intrusion be reasonable.

Recognizing the power of the constitutional language, the Court has begun in recent cases to focus more openly on reasonableness as the "central requirement" of the Fourth

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[2] Akhil Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757 (1994); Akhil Amar, *Terry and the Future: Terry and Fourth Amendment First Principles*, 72 St. John's L. Rev. 1097 (1998).

Amendment. *Illinois v. McArthur*, 121 S. Ct. 946, 949 (2001), citing *Texas v. Brown*, 460 U.S. 730, 739 (1983); *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (reasonableness is the "central inquiry"). In *Vernonia* this Court matter-of-factly noted that "the ultimate measure of the constitutionality of a government search is 'reasonableness.'" 515 U.S. at 652. *See also United States v. Knights*, 122 S. Ct. 587, 591 (2001) (noting "touchstone of the Fourth Amendment is reasonableness"). We welcome this trend, and view it as a signal that a textually honest, historically accurate, and common sense framework of the Fourth Amendment is in the making.

Critics charge that the move to a reasonableness test will eviscerate the protections of the Fourth Amendment – that without the elaborate categorical constructs of probable cause, warrants, individualized suspicion, and the like, the Fourth Amendment's doctrinal edifice will collapse. But a reasonableness inquiry is not an inquiry without structure and categories. Rather, it is an inquiry whose structure depends on varied circumstances – an inquiry that recognizes that the key categorical considerations may be different in different kinds of cases, and do not always revolve around warrants, probable cause and individualized suspicion.

Historically, of course, civil trespass suits were the typical remedy for an unlawful search or seizure. Bradford P. Wilson, *Enforcing the Fourth Amendment: A Jurisprudential History* 9-33 (1986). In many cases, civil jurors helped determine whether a search or seizure was reasonable, and the damages they imposed were the means of deterring police misconduct. Thus, civil tort law, which continues to secure citizens in their persons, homes, papers and effects from unreasonable intrusions, can provide useful determinants of reasonableness.

But tort law concepts of reasonableness are only the beginning of the inquiry.[3] Because it is a constitution we are expounding – a single document built around a single set of themes and values – the broad reasonableness language of the Fourth Amendment must be construed in light of rules and principles affirmed elsewhere in the Supreme Law. Thus, in this model of constitutional reasonableness, Fourth Amendment doctrine must be crafted to shelter myriad basic constitutional values – not just the values of privacy and secrecy that have occupied so much judicial attention, but also values such as democratic legitimacy and equality, freedom of expression, personal respect and dignity, just compensation, property, due process and the like. These values will inform each and every Fourth Amendment inquiry.[4] For instance, metal detectors in airports and courtrooms are permissible searches because, among other things, they are relatively unintrusive and well-justified, and, critically, because they treat all persons – rich and poor,

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[3] As we have noted before, the Fourth Amendment "is not mere tort law but constitutional tort law. The ordinary tort law rules applicable to private persons may not always sensibly apply when we deal with government officials who are both entitled to do things that private persons generally may not (levy taxes, for example) and barred from doing things private persons may sometimes do (practice race discrimination, for example)." Amar, 72 St. John's L. Rev. at 1119.

[4] Although the drug test search and seizure at issue here is not a search for law enforcement purposes, that fact does not change the analysis. The Fourth Amendment is not limited to searches for law enforcement or any other purpose – it covers every search and every seizure for whatever reason. Indeed, in many searches, there may be dual purposes for the search. For example, the purpose of metal detectors is not only to prevent future harms and to enhance safety, but also to find and prosecute people who have violated the law by planning to blow up or hijack an airplane. Where there are several legitimate reasons for the search, it would seem to make the search more, not less reasonable.

politically powerful and politically powerless – equally, even though the detectors are not based on any warrant, probable cause or even individualized suspicion. To give another example, a search of a newspaper's files should raise considerable concern, and should require special safeguards in light of the obvious First Amendment implications. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (noting where the materials "sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.'").

In addition to explicit constitutional norms, constitutional doctrinal notions of proportionality and nexus – the fit between government's ends and its chosen means – can also set additional markers to determine the reasonableness of searches and seizures. Such an ends-means inquiry is common in constitutional law. *E.g.*, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *United States v. Virginia*, 518 U.S. 515 (1996). In this context, proportionality and nexus means that whether a government action is reasonable depends not just on the probability of government finding what it is looking for, but also on how important success of a given search or seizure really is, the intrusiveness of the government action necessary to achieve that success, the identity and vulnerability of the search target, the availability of other means of achieving the government's goal, and so forth. The Court has already embraced many of these quite intuitive notions in the context of the Fourth Amendment. In *Terry*, for example, it expressly recognized the common sense proportionality principle that less serious intrusions require less weighty justifications. Thus, the police officer's suspicions justified a brief stop, and the concerns for his safety justified a brief pat-down.

But the flip side of this logic is that more weighty intrusions will require more weighty justifications. In *Terry*, the officer's suspicions and need for safety would not have justified a full-blown invasive search. And in *Winston v. Lee*, 470 U.S. 753 (1985), the government sought to remove a bullet in the neck of a witness in a criminal case. Even though the government had both probable cause and a warrant, the proposed surgical removal of the bullet was too intrusive and the marginal evidentiary value of the bullet too slight to justify the intrusion. Thus, it was unreasonable. The bang the government got for the buck was simply not enough. Yet another example is found in *Welsh v. Wisconsin,* where the Court held that police could not invade a man's home at night without a warrant to arrest him for a noncriminal traffic offense because that extremely serious invasion was not justified by the relatively mild offense or the need to preserve the evidence of it. 466 U.S. 740 (1984). *See also McDonald v. United States*, 335 U.S. 451, 459 (1948), Jackson, J. concurring (seriousness of the crime is relevant to Fourth Amendment inquiry, and entry into home without warrant and without emergency displayed "a shocking lack of sense of all proportion").

Finally, as we have argued elsewhere, the common sense of the people acting collectively – through jury verdicts, community advisory boards, election results, longstanding traditions, and general legal patterns – must be relevant to the reasonableness analysis. The Amendment, after all, affirms a right of *the people,* and as this Court has recognized, "the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion on the reasonable expectations of personal security caused by these practices." *Terry*, 392 U.S. at 17, n.14; *Chandler*, 520 U.S. at 309-10 (noting Georgia was the first and only state to condition political

candidacy on a drug test); Akhil Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 124 (2000) (noting the importance of looking to what other states are doing because "[m]ost important, law canvassing has the salutary effect of focusing the Justices not on themselves and their own wisdom, but on the wisdom of the American people more generally).[5]

As should be clear from all this, a reasonableness standard is far from a toothless watchdog. Adoption of an overall reasonableness approach does not mean that all government searches or seizures will be justified. Indeed, the reasonableness rule might well provide *greater* protection against government action than presumptive requirements of warrants, probable cause or even individualized suspicion. As *Winston v. Lee*, cited above, and other cases make clear, for example, some searches may be unreasonable because they are too intrusive, no matter how particularized and justified the government's suspicion is. Like *Winston*, the present case illustrates that a reasonableness test can be used to invalidate overreaching by government.

[5] In addition to the contours of reasonableness developed through judges and juries in civil tort actions, there are other modes in which reasonableness can be delineated and enforced. For example, legislatures could fashion rules delineating the search and seizure authority of government agents. Agency guidelines spelling out concrete search and seizure guidelines for recurring fact patterns could be created and published. *See* Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. at 816-19. Taken together, and taken seriously, these judgments, guidelines and rules can provide standards "sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing." *Atwater v. City of Lago Vista*, 121 S. Ct. 1536, 1553 (2001).

B. The School Drug-testing Policy Here Is Not Reasonable in Light of All the Circumstances.

When measured by the Fourth Amendment's reasonableness standard, the monitored urine collection at issue here fails. First, it is important to note that this policy involves both a seizure (the requirement that the student go in the restroom to produce and turn over a urine sample) and a search (the examination and testing of the urine). The Fourth Amendment protects the right of the people to be "*secure in their persons*" – singling out bodily intrusions for special judicial solicitude. Both the search and the seizure must be justified, and here they simply are not.

To begin with, we must remember that the policy at issue here is not embodied in any Act of Congress or piece of legislation by a State. While school board enactments are entitled to respect as a form of state law to be sure, they simply cannot be afforded the same kind of deference in a Fourth Amendment case as a statutory enactment that has been considered by various legislative committees, with input from the Chief Executive of a State or the federal government.

There is another process aspect of the school board policy that argues against judicial deference – the policy applies only to a group of individuals who lack voting rights. Even after the Twenty-Sixth Amendment lowering the voting age to eighteen, the overwhelming majority of high school students in America are not yet old enough to vote and register their preferences concerning searches, drug policies and the like. Where a law singles out for inferior treatment a distinct class of persons who are structurally disabled from protecting their interests in the legislative arenas, constitutional principles of equality often justify

searching judicial review of government actions. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152-53 n.4 (1938); *Sugarman v. Dougall*, 413 U.S. 634 (1973).

Skepticism of the policy at issue here is also warranted because the policy is so unusual. As we suggested above, a reasonableness inquiry takes full account of community sentiment measured broadly.[6] The record here suggests that at most, "a handful" of the 15,000 school boards across the nation "have taken up drug testing." C.A. App. 856. Certainly petitioners have not suggested or demonstrated that their policy is typical or widely adopted. Nor is this high school district merely aberrational among high schools. The fact that community college districts throughout the country have not felt the need to test their students who participate in extracurricular activities cuts against the reasonableness of the policy in question. We are aware of no reason to believe that high school students subject to this policy are more likely to use drugs than college students a few years older. One explanation for why junior colleges (and four-year colleges, for that matter) have not undertaken steps like that taken here may be that college aged students can vote and may express disapproval at the polls. That possibility, of course, simply underscores how the political process cannot always be trusted to correct its own excesses in the search and seizure area where certain voices are not heard.

A Fourth Amendment reasonableness inquiry does not,

[6] It is particularly important in light of small-town politics that community sentiment be measured broadly. Thus, although petitioners emphasize that no one spoke out at the town meeting against the policy, numerous parents and community members have spoken out since, including directly to this Court as *amici*, and have said they did not know about the meeting or they did not feel they could speak out. In any event, the broad measure we envision involves much more than the one school involved, and thus is more likely to reliably reflect the sense of the American people.

of course, focus only on how a government search policy has been made and by whom, but also on how and why the search is conducted. And when we look at these two factors, the unreasonableness of the present policy becomes quite clear.

For starters, by any measure, the seizure of a student, the forced production of urine, and the search of the urine are highly intrusive. Indeed, "[t]here are few activities in our society more personal or private than the passing of urine." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989) (internal quotation and cite omitted); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 680, 685 (1989), Scalia, J., dissenting (calling a state-compelled urinalysis "particularly destructive of privacy and offensive to personal dignity," and a "needless indignity.") Unlike the de minimus invasion of, for example, walking through a metal detector at an airport, or even showing one's license at a driver checkpoint, the drug test involves a personal seizure of a most intimate kind. The student is required to go in the bathroom where she knows a teacher with whom she must deal every day stands outside the bathroom stall listening for sounds of "normal" urination. The student must produce and then give up her bodily fluids which the teacher then tests for temperature and inspects for clarity. Even an experienced adult would find the procedure embarrassing – a modest high school student might find it intolerable. Indeed, in *Chandler*, when the required test took place in a doctor's office and the results would not be published, the Court nevertheless found a significant intrusion. 520 U.S. at 312.

Because the intrusion is so serious, the reasonableness balance and its concern for proportionality and nexus requires an equally serious government justification that is served by the law. But what interest does the government

claim? Deterrence and safety. Pet. Br. at 14, 42. Deterrence is undoubtedly a laudable goal for a school board, but, like the general goal of "investigating crime" in *Terry* that would not justify a full-blown seizure, it cannot justify the substantial bodily intrusion the drug-testing imposes. If it did, the government could easily set up checkpoints on street corners to search the pockets and purses of all passersby to deter drug use, or it could continuously monitor every checking account to deter tax fraud. *Cf. City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (where checkpoint's primary interest is general interest in crime control, the checkpoint violates the Fourth Amendment). Even given the special responsibility school districts have for the students in their care, this generalized, non-immediate, non-specific goal cannot justify the repeated physically invasive searches and seizures of the drug-testing. *See Tinker v. Des Moines*, 393 U.S. 503 (1969) (reminding us that school children, by virtue of their age, do not lose all constitutional protection).

As for safety, that goal could indeed justify a search and seizure if there were any evidence to support the safety concern (as there was in *Vernonia*) or if the need for safety was immediate (as it was in *Terry)*. Here, there is not. Nor does common sense suggest that students who participate in choir or band are in more danger if they participate in those activities under the influence of drugs. *Cf. Chandler*, 520 U.S. at 321-22 (Georgia "officials typically do not perform high-risk, safety sensitive tasks"). Thus, the scope of the seizure is not "'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry*, 392 U.S. at 19. The disconnect – the lack of nexus and proportionality – between the non-immediate government interest and the high level of invasion demonstrates the policy's unreasonableness.

That brings us to another key point: the drug-testing policy is unreasonable because the students subject to the random drug-testing are no more likely to be involved in illicit drug use than anyone else. Indeed, common sense would suggest that the students involved in extracurricular activities like Choir and FFA may well be the students least likely to be involved in drug use.[7] To be sure, such common sense could be overcome by sufficient on-the-scene experience showing that the targeted extracurricular activities were in fact often the setting for illicit drug use, but the school board has not suggested any experience or evidence (other than occasional anecdotes) along those lines. *See Chandler*, 520 U.S. at 321 ("Georgia asserts no evidence of a drug problem among the State's elected officials.") In fact, the school district has not suggested any reason why *this* group of people – participants in extracurricular events in high school – are any more suspicious with regard to drug usage than all students or for that matter all persons. If random testing of this group is reasonable, why couldn't government require random drug testing of everyone?

Perhaps a drug test for everyone wouldn't be so bad. At least under such a system, students would not feel stigmatized since everyone would be in the same boat. And many of the occupants of that boat would be voters, who – because they would suffer the same indignity as the students – would at least be somewhat able to virtually represent their interests. A policy that applies to everyone rather than a few has the virtue of non-discrimination, and that virtue may be sufficient to tip the balance in some cases. Thus, as noted earlier, the metal detector search at an airport or courthouse

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[7] In this respect, it is significant that the plaintiff here, Lindsay Earls, is a wholly innocent citizen. This case does not raise the exclusionary rule as a remedy for violations, so there is no conflict here between the truth and the Fourth Amendment as there is in suppression cases.

is reasonable, in part, because it happens to everyone. Such a search is wholly non-discriminatory, and that counts in its favor. But factors other than non-discrimination that might justify another global search are absent in such a global drug-test. A metal detector is non-intrusive, and the threat to safety posed by any guns on planes or in government buildings is quite large – those are a few reasons why most people (including, significantly, those persons seeking entry to those planes and buildings) generally agree that it is proportionate and reasonable. But the safety-in-numbers argument loses some of its appeal as the intrusiveness of the search escalates, and the government's safety return on successful searches decreases. Thus, a strip-search before boarding a plane does not become reasonable simply because everyone who boards is strip-searched. Similarly, the monitored urine sampling at issue here intrudes so deeply on personal dignity and bodily integrity, and offers so little in safety assurances, that no one would take comfort in the thought that everyone else was suffering the same indignities.

Finally, the school board cannot claim that the policy is reasonable because students can opt out of it. As this Court noted in *Lee v. Weisman*, when the school board argued that its policy of prayer at graduation was non-coercive because students did not have to attend,

> Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalism in the extreme. . . . Everyone knows that, in our society and in our culture, high school graduation is one of life's most significant occasions. A school rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free

> to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student though youth and all her high school years.

505 U.S. 577, 595 (1992). If a school board cannot require a child to give up her constitutional claim to religious liberty "as the price of attending her own high school graduation," it also may not require a child to give up extracurricular activities as the price of protecting herself against unreasonable search and seizure.

Opting out of extracurricular activities means opting out of much that is important about the high school experience. Colleges look closely at high school extracurricular activities for purposes of both admission and scholarships, and participation in numerous activities may increase the chance of admission. Indeed, Lindsay Earls' admission to Dartmouth was dependent, in some measure, on her participation in a variety of extracurricular activities. A student who avoids those activities to protect herself against unreasonable search and seizure pays a heavy price for that choice. And extracurricular activities are important opportunities for students to explore different vocations, to develop social and leadership skills, and to learn to live and work together as responsible adult citizens. For these reasons, participation in these ongoing activities is far more crucial – and far less "voluntary" – than attending a high school graduation. The false option to not participate in extracurricular activities cannot make the searches and seizures conducted under the drug-testing policy reasonable.

C. The Circumstances That Made the Vernonia Policy Reasonable Are Absent Here.

The drug-testing policy approved in *Vernonia* applied to student athletes who, because of the very activity that triggered the drug-testing, had already given up significant aspects of their privacy, modesty, and personal dignity. For athletes who already underwent medical exams (including urine samples) and who showered and dressed together regularly in communal showers and bathrooms, the incremental burden on the "security of their persons" from random drug-testing was small. Thus, the requirement of proportionality was satisfied. But high school choir and band members have not compromised their rights to privacy, personal dignity, and bodily integrity due to their participation in choir and band. Thus, the affront of the monitored urine-sampling process is both freshly imposed and powerful.

Similarly, in *Vernonia*, drug-testing athletes was reasonable because the athletics themselves created both incentives and dangers related directly to drugs: either the drugs might be taken to enhance athletic performance (as in steroids) or the interaction between the effects of drugs and the vigorous physical activity of the sport created a particular danger. The Court highlighted this nexus:

> [T]his program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high. Apart from the psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened by the District's Policy have been demonstrated to pose

> substantial physical risks to athletes.

515 U.S. at 662. But here, there is no nexus between the targeted activities – the Academic Team, Band, Choir, Show Choir, Color Guard, Future Farmers of America, and Future Homemakers of America – and drug-use or drug-testing. Participants in these activities are not likely to seek to enhance their performance with drugs (indeed, the Choir teacher noted that the lemon juice was the only performance enhancer of which she was aware, J.A. 127), nor are the activities seriously likely to be more dangerous if the students who participate have taken drugs (although the government professes concern over FHA members who "work with cutlery or sharp instruments," Brief for the United States As Amicus Curiae Supporting Petitioners at 20, the record reflects that the extracurricular activities involve mock interviews, not sharp instruments, C.A. App. 672).

Finally, it was significant in *Vernonia* that not only was there evidence that large numbers of athletes were taking drugs (indeed, the problem was of "epidemic proportions"), but the record was also clear that the athletes were "the leaders of the drug culture." 515 U.S. at 649. Thus, there was a strong nexus between the policy providing that athletes would be tested, and the problem of drug use that had been specifically identified and documented among athletes. That nexus is completely lacking here. Indeed, petitioners have conceded that the policy is *not* based on the belief that these students were the most likely to abuse drugs. Pet. Br. at 41. Without such a nexus, and without proportionality, the drug-testing policy is unreasonable.

CONCLUSION

If this Court takes the Fourth Amendment at its word, and considers whether, in light of all the circumstances the search and seizure at issue here is constitutionally reasonable, it must conclude that it is not.

Respectfully submitted,

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February 6, 2002

Supreme Court, U.S.
FILED
FEB 6 2002
CLERK

No. 01-332

IN THE
SUPREME COURT OF THE UNITED STATES

BOARD OF EDUCATION OF TECUMSEH PUBLIC SCHOOL DISTRICT *ET AL.*,
Petitioners,

v.

LINDSAY EARLS and LACEY EARLS, minors, by their next friends and parents, John David and Lori Earls, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF OF JUVENILE LAW CENTER; ADVOCATES FOR CHILDREN OF NEW YORK; CHILDREN & FAMILY JUSTICE CENTER; EDUCATION LAW CENTER-NJ; EDUCATION LAW CENTER-PA; JUSTICE POLICY INSTITUTE; JUVENILE JUSTICE PROJECT OF LOUISIANA; JUVENILE RIGHTS ADVOCACY PROJECT; NATIONAL CENTER FOR YOUTH LAW; THE SENTENCING PROJECT; UNIVERSITY OF THE DISTRICT OF COLUMBIA, JUVENILE LAW CLINIC; YOUTH LAW CENTER; AND LAW PROFESSORS THERESA GLENNON, MARTIN GUGGENHEIM, RANDY HERTZ, WALLACE J. MLYNIEC, FRANCINE SHERMAN & JOSEPH TULMAN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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45 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. INDIVIDUAL, SUSPICION-BASED SEARCHES OF STUDENTS BY PUBLIC SCHOOL TEACHERS SHOULD NOT BE ABANDONED IN FAVOR OF BLANKET, SUSPICION-LESS SEARCHES 3

A. The Policy Is Unconstitutional Because The Government Did Not Establish That Individualized, Suspicion-Based Searches Were Not Feasible Before Implementing Suspicion-Less Drug Testing Of Children That Participate In Extra-Curricular Activities. 5

B. The Privacy Interests at Issue Here Are Greater than Those That Were Intruded upon in *Vernonia*. 10

C. The Nature Of The Intrusion Is Unreasonable Because Its Consequences Deprive Students Of The Opportunity To Learn, Earn Academic Credits, And Enroll In Classes. 13

D. The Tenth Circuit Correctly Held That The School District's Concern Is Not Immediate Because There Is No Illegal "Drug Crisis," "Rebellion" Or Dramatically Increased Drug . 16

II. AN INFLATED FEAR OF SCHOOL VIOLENCE DOES NOT JUSTIFY MASS, SUSPICION-LESS SEARCHES FOR NON-VIOLENT BEHAVIOR . 20

A. The Perception That Schools Are Increasingly Violent and That Our Children and Teachers Are Not Safe Is at Odds With Evidence Showing That Schools Are Among the Safest Places to Be. . . 23

B. If Permitted, Generalized Drug Testing of Every Public School Student Will Become As Routine & Inflexible as Other "Zero Tolerance" Measures That Punish Children By Depriving Them of School Involvement. 26

CONCLUSION 30

APPENDIX 1A

TABLE OF AUTHORITIES

FEDERAL CASES

Bell v. Wolfish, 441 U.S. 520 (1979).....7

Brooks v. East Chambers Sch. District, 730 F. Supp. 759 (S.D. Tex. 1989), *aff'd*.....12,19

Chandler v. Miller, 520 U.S. 305 (1997).....4, 6, 7, 8, 9

Earls v. Board of Education of Tecumseh Public Sch. District, 242 F.3d 1264 (10th Cir. 2001) 4, 6, 12, 13, 15, 16, 18, 20, 21

Earls v. Board of Education of Tecumseh Public Sch. District, 115 F. Supp. 2d 1281 (W.D. Okla. 2000) 15, 16, 17, 20

Elkins v. United States, 364 U.S. 206 (1960).....3

Joy v. Penn-Harris-Madison Sch. Corp., 212 F.3d 1052 (7th Cir. 2000).....8, 9, 12, 18

Miller by Miller v. Wilkes, 172 F.3d 574 (8th Cir. 2000).....21

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).....7

New Jersey v. T.L.O., 469 U.S. 325 (1985).....2, 3, 5, 9

Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989).....3

Tannahill v. Lockney, 133 F. Supp. 2d 919 (N.D. Tex. 2001).....12, 19

Thomas v. Roberts, 261 F.3d 1160 (11th Cir. 2001).....20

Thompson v. Carthage Sch. District, 87 F.3d 979 (8th Cir. 1996).....19, 20

Tinker v. Des Moines Independent Community Sch. District, 393 U.S. 503 (1969).....11, 13, 14

Todd v. Rush County Schools, 133 F.3d 984 (7th Cir. 1998) 8

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Vernonia Sch. District 47J v. Acton, 515 U.S. 646 (1995).....2, 3, 4, 5, 6, 9, 11, 13, 16, 17, 18, 21, 23

Willis by Willis v. Anderson Community Sch. Corp., 158 F.3d 415 (7th Cir. 1998).....7, 8, 9, 12

STATE CASES

In re F.B., 726 A.2d 361 (Pa. 1999).....19

In Interest of S.S., 452 Pa. Super. 15, 680 A.2d 1172 (Pa. Super. 1996).....19, 21

Theodore v. Delaware Valley Sch. District, 761 A.2d 652, 148 Ed. Law Rep. 985 (Cmwlth. Ct. 2000).....9, 12

Trinidad Sch. District No. 1 v. Lopez, 963 P.2d 1095 (Co. 1998)..... 9, 12, 14, 15, 16, 17

FEDERAL STATUTES

Gun Free Schools Act, 20 U.S.C. § 8921.....28, 29

MISCELLANEOUS

J. Nathan Jensen, *Don't Rush to Abandon A Suspicion-Based Standard for Searches of Public School-Students*, 2000 B.Y.U.L. Rev. 695, 709 (2000).....7, 9

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INTEREST OF THE *AMICI*[1]

The organizations and individuals submitting this brief work with and on behalf of adolescents, particularly young people in the education and justice systems. Some provide services directly to youth, some are engaged in research and some are associations of professionals who work with youth. *Amici* approach the issues in this case from a variety of perspectives - education, juvenile justice, child welfare, research and policy development - but are united in their concern about preserving respondents' civil rights. The school context alone does not justify mandatory, suspicion-less, urinalysis drug testing upon all participants in any school extra-curricular activity. *Amici* urge the Court not to abandon a suspicion-based standard for searches of public school students, and provide the Court with an extensive body of social science research about school safety.

Identity of Amici Curiae[2]

Juvenile Law Center; Advocates for Children of New York; Children & Family Justice Center; Education Law Center-NJ; Education Law Center-PA; Justice Policy Institute; Juvenile Justice Project of Louisiana; Juvenile Rights Advocacy Project; National Center for Youth Law; The Sentencing Project; University of the District of Columbia, Juvenile Law Clinic; Youth Law Center; and Law Professors Theresa Glennon, Martin Guggenheim, Randy Hertz, Wallace Mlyniec, Francine Sherman & Joseph Tulman.

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[1] *Amici* file this brief with the consent of all parties. Letters of consent have been lodged with the Clerk of Court. No counsel for a party authored this brief in whole or in part. No person or entity, other than *amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

[2] A brief description of each of the organizations and individuals listed herein appears in the Appendix.

SUMMARY OF ARGUMENT

In 1995, this Court upheld a program for random urinalysis drug testing of student-athletes *upon finding* evidence that the school was in a "state of rebellion" and discipline actions had reached "epidemic proportions." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 649 (1995). In the wake of *Vernonia*, Petitioner, the Tecumseh School District, decided to drug test almost its entire student body without actually suspecting that any particular student consumes illicit drugs. Given the careful line drawn by this Court in *Vernonia*, the Tecumseh School District is wrong to assume courts would endorse drug testing of students engaged in no dangerous activities and with no history of drug use.

Vernonia must not be interpreted as condoning anything but suspicion-less searches of student-athletes who are known to be leaders of a well-documented and extreme drug problem among the student body. When the unique circumstances of *Vernonia* are not present, an individualized suspicion standard, based upon this Court's holding in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), must be followed. In accordance with *T.L.O.*, a search of a public school student by a school official is constitutionally permissible only "when there are reasonable grounds for suspecting that the search will turn up evidence that the student had violated or is violating either the law or the rules of the school." *Id.* at 342.

Amici recognize that preserving an orderly school environment may entail easing restrictions to which searches by public authorities are ordinarily subject, *id.* at 339-40, but unsupported fear of student misbehavior does not justify abandoning the tenants of *T.L.O.* National statistics demonstrate that there has been a significant reduction in juvenile crime over the past several years. Nevertheless, isolated incidents of extreme violence have exaggerated the risk of school crime, and set into motion a string of "zero tolerance"

polices and procedures that fail to make schools safer and lead to the unnecessary exclusion of students from the educational process. Particularly where there is no allegation of school violence in Tecumseh, popular misconceptions about youth crime should not, at any level, justify a more restrictive than necessary formulation of Fourth Amendment rights.

ARGUMENT

I. INDIVIDUAL, SUSPICION-BASED SEARCHES OF STUDENTS BY PUBLIC SCHOOL TEACHERS SHOULD NOT BE ABANDONED IN FAVOR OF BLANKET, SUSPICION-LESS SEARCHES

The Fourth Amendment to the United States Constitution provides that the Federal Government shall not violate "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." This Court has held that the Fourteenth Amendment extends this constitutional guarantee to searches and seizures by state officers, *see Elkins v. United States*; 364 U.S. 206 (1960), including public school officials, *New Jersey v. T.L.O.*, 469 U.S. 325, 336-337 (1985). In *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 617 (1989), the Court held that state-compelled collection and testing of urine, such as that required by the drug testing policy (Policy) enacted by the Tecumseh School District (Tecumseh), is a "search" subject to the demands of the Fourth Amendment.

As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is "reasonableness." *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995). "To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing." *See Chandler v. Miller*, 620 U.S. 305, 315 (1997). Rare exceptions to this rule are warranted when the government establishes the existence of

"special needs." *See id.* Whether a particular search meets the reasonableness standard in these circumstances "'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *See Vernonia*, 515 U.S. at 652-53. In order to "fit within the closely guarded category of constitutionally permissible suspicion-less searches," the government must show:

1. A "special need" or "finding of need" in the public school setting, which this Court has characterized as the "most significant element" in this analysis; and

2. That the nature of the privacy interest is outweighed by the nature of the intrusion, the nature and immediacy of the governmental concern, and nature and efficacy of the search.

See Chandler, 620 U.S. at 308; *Vernonia*, 515 U.S. at 652-53. The government's failure to carry its burden in making either one of these two showings is an independent basis upon which a court must strike down a mass, suspicion-less drug test as unreasonable.

Analysis demonstrates that the Tenth Circuit Court of Appeals held correctly that Tecumseh confronted a less emergent situation than the school district faced in *Vernonia*. Tecumseh overreacted by implementing its mass, suspicion-less drug-testing policy without first establishing that individualized, suspicion-based testing was not feasible. The testing was imposed upon every student who participated in an extra-curricular activity, including many non-athletes. This meant that the privacy interests intruded upon were greater than those at issue in *Vernonia*. These factors distinguish *Earls* from *Vernonia*, and establish a setting in which Tecumseh should not have abandoned individualized, suspicion-based testing in favor of blanket, suspicion-less ones. For these

reasons, Tecumseh's policy does not "fit within the closely guarded category of constitutionally permissible suspicion-less searches," and this Court should affirm.

A. The Policy Is Unconstitutional Because The Government Did Not Establish That Individualized, Suspicion-Based Searches Were Not Feasible Before Implementing Suspicion-Less Drug Testing Of Children That Participate In Extra-Curricular Activities.

In *Vernonia v. Acton*, 515 U.S. 646, 665 (1995), the Court upheld a public school's suspicion-less drug testing policy that applied to children who were participating in extra-curricular athletics. One of the most important issues in *Vernonia* was whether the school district established that the individualized, suspicion-based searches, which this Court upheld in *T.L.O*, 469 U.S. 325, were ineffective before resorting to suspicion-less searches. *See Vernonia*, 515 U.S. at 665, 678 (O'Connor, J., dissenting); *see also U.S. Supreme Court Official Transcript of Oral Argument, Vernonia v. Acton*, 1995 WL 353412, at * 14, * 15-17 (1995). Before upholding the searches in *Vernonia*, the Court rejected the argument that, where the school district faced an "immediate crisis" and "rebellion" caused by "a sharp increase in drug use," suspicion-based testing would be feasible. *See Vernonia*, 515 U.S. at 665. The Court concluded that "testing based on 'suspicion' of drug use would not be better, but worse" than suspicion-less group searches in this unique, crisis situation.[3] See *id.*

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[3] Recent experience with suspicion-less drug testing of children by public school officials has proven wrong the Court's conclusion that "testing based on 'suspicion' of drug use would not be better, but worse" than the suspicion-less searches, and justified the dissent's sharp disagreement. *See Vernonia*, 515 U.S. 646, 663-64, and 672 (O'Connor, J., dissenting). The Court was concerned the individualized testing would "generate[ ] the expense of defending lawsuits that charge such arbitrary

Although the Court warned "against the assumption that suspicion-less drug testing will readily pass constitutional muster in other contexts," *see Vernonia*, 515 U.S. at 665, the Court did not explicitly rule that a suspicion-less search would be held unconstitutional if the government did not first establish that individualized, suspicion-based searches were not feasible until *Chandler v. Miller*, 520 U.S. 305 (1997). There, the Court struck down a state law that required candidates for state office to pass a suspicion-less urinalysis drug test. The facts in *Chandler* lacked the "immediate crisis," "rebellion," and "sharp increase in drug use" that justified the suspicion-less searches in *Vernonia*. In fact, the Court observed that there was no evidence that a State officeholder had a drug problem or that such drug problems had ever at existed among this group. *See id.* at 319. The Court held that the suspicion-less search law was unconstitutional because the government "offered no reason why ordinary law enforcement methods would not suffice to apprehend such addicted individuals." *See id.* at 320.

The core of this holding is that in non-emergent, non-crisis situations, the government cannot overact. It must employ individualized, suspicion-based searches and, significantly, establish that they are not feasible before rolling out suspicion-less group searches. The latter are a category of "closely guarded" exceptions, and to hold otherwise would flip the exception and the rule on its head. *See Chandler*, 520 U.S. at 308, 325. To comply with *Vernonia* and *Chandler*, therefore,

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imposition, or that simply demand greater process before accusatory drug testing is imposed." *See Vernonia*, 515 U.S. at 663-64. In the name of reducing unnecessary litigation, the suspicion-less testing has resulted in clogged federal dockets in order to define what circumstances constitute a "special need." The Tenth Circuit observed this problem: in the suspicion-less search context, "the Supreme Court's special needs cases have engendered some criticism for failing to adequately define what a special need is." *See Earls*, at 1269 & n.3, *citing* Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S. C. L. Rev. 258, 261 (Winter 2000).

the government must establish that individualized, suspicion-based searches are not feasible before suspicion-less searches can be implemented.[4]

Although *Chandler* did not explicitly require public schools to follow this rule, the Seventh Circuit Court of Appeals did. In *Willis by Willis v. Anderson Community Sch. Corp.*, 158 F. 3d 415 (7th Cir. 1998), the appeals court struck down suspicion-less drug testing of children by public school officials. The court observed that under *Vernonia*, "courts consider the feasibility of a suspicion-based search when assessing the efficacy of the government's policy." *Id.* at 421. Noting that, "the immediacy of the Corporation's concern does not rise to the level of that in *Vernonia*," the court struck down the suspicion-less, blanket searches because the suspicion-less tests addressed concerns that could have been "tackled by means of a traditional, suspicion-based approach." *Id.* at 423-24. "Particularly because the [school] has not demonstrated that a suspicion-based system would be unsuitable, in fact would not be highly suitable, we think the balance of our

[4] The Court has consistently followed this rule in other contexts. *See, e.g., Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674 (1989) (holding that because it is "not feasible to subject [customs] employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments," a suspicion requirement is impractical for searches of customs officials for drug impairment); *Bell v. Wolfish*, 441 U.S. 520, 559 n.40 (1979) (holding that because observation needed to gain suspicion would cause "obvious disruption of the confidentiality and intimacy that these visits are intended to afford," a suspicion requirement for searches of prisoners for smuggling following contact visits is impracticable); *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976) ("[A] requirement that stops on major inland routes always ... based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens"). *See* J. Nathan Jensen, *Don't Rush to Abandon A Suspicion-Based Standard for Searches of Public School-Students*, 2000 B.Y.U. L. Rev. 695, 709 (2000).

'context-specific inquiry' tips in favor of [the students]." *Id.* at 424-25.

The same conclusion was reached in *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F. 3d 1052 (7th Cir. 2000). The absence of immediacy in *Joy* was clear: "[The school] simply has not established that any immediate problem with drugs or alcohol exists for its students in extracurricular activities." *Id.* at 1065. Citing *Chandler*, the appeals court held that "suspicionless drug testing without evidence of a drug problem by the targeted group should not be used if suspicion-based drug testing is possible." *Id.* "With respect to random testing of those who participate in extracurricular activities, we believe that, according to the methodology employed by the Supreme Court in *Vernonia*, there has been an inadequate showing that such an intrusion is justified."[5] *Id.*

The holdings in *Willis* and *Joy* recognize that different searches are constitutional in different contexts, and the adoption by schools of only suspicion-less searches, without any basis for the exception, are unreasonable. This seamlessly weaves *Chandler* into the school drug testing landscape, where, as this case demonstrates, it is much needed. Like the school districts in *Willis* and *Joy*, Tecumseh did not face the "drug crisis" or "rebellion" that distinguished *Vernonia*. Likewise, Tecumseh did not establish that individualized, suspicion-based testing was not feasible before it rolled out its suspicion-less, drug-testing regime.[6] This approach violates *Chandler* and

[5] Certain aspects of the drug testing policy were sustained only on the basis of *stare decisis*, under *Todd v. Rush County Schools*, 133 F. 3d 984 (7th Cir. 1998), in which the appeals court did not apply the *Vernonia* analysis.

[6] A school's drug testing policy is not insulated from review merely because it provides for individualized, suspicion-based testing. In *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095 (Co. 1998), the policy

Vernonia as clearly as the search policies at issue in *Anderson* and *Joy*. Like the suspicion-less tests in *Chandler*, *Anderson*, and *Joy*, implementation of a suspicion-less Policy probably "[was] not needed," and its suspicion-based approach should not have been abandoned. *See Chandler*, 520 U.S. at 320.[7]

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at issue mandated drug testing for all students in grades six through twelve who wanted to participate in an extra-curricular activity. "In addition to the mandated testing, the Policy allows officials to test any student participating in an extracurricular activity based on a reasonable suspicion that the student is under the influence of illicit drugs/alcohol." *Id.* A more comprehensive drug-testing policy was at issue in *Theodore v. Delaware Valley Sch. Dist.*, 761 A.2d 652, 148 Ed. Law Rep. 985, (Cmwlth. Ct. 2000). There, five different types of drug testing were authorized by the policy. *See id.* at 654 & n.5. In each case, the appellate court scrutinized the policies under the *Vernonia* analysis, even though the policies both contained these provisions. That Tecumseh's policy authorizes individualized, suspicion-based searches, therefore, does not satisfy the requirements of *Vernonia* and *Chandler*.

[7] There is no basis to assume that individual suspicion-based searches are ineffective or unworkable in school settings. As this Court noted in *T.L.O.*,

> [Public school students] spend the school hours in close association with each other, both in the classroom and during recreational periods. The students in a particular class often know each other and their teachers quite well. Of necessity, teachers have a degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child.

Id. at 348 (Powell, J., concurring); *See also, Vernonia*, 515 U.S. at 678 (O'Connor, J., dissenting) ("In most schools, the entire pool of potential search targets--students--is under constant supervision by teachers and administrators and coaches, be it in classrooms, hallways, or locker rooms." (citations omitted)). *See* J. Nathan Jensen, *Don't Rush to Abandon A Suspicion-Based Standard for Searches of Public School Students*, 2000 B.Y.U. L. Rev. 695, 709-710 (2000).

B. The Privacy Interests at Issue Here Are Greater than Those That Were Intruded upon in *Vernonia*.

To determine the nature of the privacy interests of the students who are compelled to undergo suspicion-less, blanket drug testing, courts must analyze two factors: (1) the context and (2) the students' relationship with the government. *See Vernonia*, 515 U.S. at 657. In *Vernonia*, the plaintiffs at issue were student-athletes, who have a lesser expectation of privacy than other students for several reasons. *See id.* First, these children "go out for the team" voluntarily. They also pursue athletic competition knowing that they "communally undress" in their locker rooms, which requires a lack of privacy. Most of the children must undergo a urinalysis and physical before they can take the field. Moreover, they voluntarily submit to regulations on fields and in arenas that do not apply to other children, which makes athletics more like a regulated industry. *See id.* While these factors accounted for the diminished privacy expectations of student-athletes, the Court held that these factors were limited to student athletes. The remainder of the student body does not "shed [its] constitutional rights...at the schoolhouse gate." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969). *Vernonia*, therefore, distinguished between two groups of school children: the student-athletes who have a diminished expectation of privacy, and the remaining students who have a higher expectation of privacy.

This distinction has been cited by a growing majority of courts which have held that the higher privacy expectations of non-student athletes cannot be intruded upon by suspicion-less group drug tests as easily as the diminished privacy rights of the student-athletes in *Vernonia*. As one district court recently ruled,

> students subject to drug testing in the Lockney School District comprise a much broader segment of the

> student population than the group of student athletes in Vernonia. Their expectations of privacy are higher. Students who do not participate in athletics are not subject to the same daily 'communal undress' or public showering as student athletes; compulsory attendance at school is much different than voluntary participation in extracurricular activities. The Court, applying the reasoning of the Supreme Court in Vernonia, finds that the student body in the District holds a higher expectation of privacy than student athletes.

See Tannahill v. Lockney, 133 F. Supp. 2d 919, 929 (N.D. Tex. 2001).

The "Supreme Court pointed out that the student population as a whole enjoys a higher expectation of privacy than the student athletes subject to testing." *Tannahill*, 133 F. Supp. 2d at 928, *citing Vernonia*, 515 U.S. at 657. Thus, as the number of students who are compelled to take drug tests grows larger and includes increasing numbers of non-athletes, their expectation of privacy grows too. *See, e.g., Anderson*, 158 F. 3d 415, 421 (7th Cir. 1998); *Joy*, 212 F. 3d 1052, 1063 (7th Cir. 2000); *Brooks v. East Chambers Sch. Dist.*, 730 F. Supp. 759, 766 (S.D. Tex. 1989), *aff'd. without op.*, (5th Cir. 1991) (holding that "the law of the Seventh Circuit is different from and less protective of student rights than Fifth Circuit law"); *Theodore v. Delaware Valley Sch. Dist.*, 761 A.2d 652, 660, 148 Ed. Law Rep. 985 (Cmwlth. Ct. 2000) ("students who participate in extra-curricular activities do not have a diminished expectation of privacy"); *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1107 (Co. 1998) ("*Vernonia* is limited to athletes, not all students who participate in extra-curricular activities").

In spite of these rulings, the Tenth Circuit Court of Appeals held that children who participate in non-athletic, extra-curricular activities *per se* have diminished privacy rights. *See*

Earls, 242 F. 3d 1264, 1276 (10th Cir. 2001). This holding overlooks the Court's distinction between the diminished privacy expectations of student-athletes and the higher expectations of non-athletes. *See Vernonia*, 515 U.S. at 657-58. And it cannot be squared with the reasons that gave rise to the Court's distinction. Of the Court's reasons for finding student-athletes have diminished privacy expectations, the Tenth Circuit held that non-student athletes who participate in extra-curricular activities have the same privacy expectations as the athletes because both groups of children voluntarily enter these activities and also have to follow rules. *See Earls*, 242 F. 3d at 1276.

These two reasons alone are not persuasive. Qualitatively, this Court's holding in *Vernonia* regarding the diminished privacy expectations of student-athletes makes sense because the drug tests require student athletes to perform only those tasks which the athletes already perform voluntarily: undergoing a urinalysis, which is required of athletes before they can play, and entering a bathroom, undressing and using the facilities, which athletes do every day before they take the field. *See Vernonia*, 515 U.S. at 617. By contrast, students who participate in non-athletic extra-curricular activities do not submit to preseason physicals, urinalyses or "communal undress" in locker rooms. *See id.* Forcing student non-athletes to undergo urinalyses coerces them into a loss of privacy that they did not voluntarily forfeit as the student athletes did. By obfuscating this distinction, particularly where *Vernonia* drew such a clear line, the Tenth Circuit Court of Appeals undermines this Court's holding that student do not "shed their constitutional rights ... at the schoolhouse gate." *See Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969).

C. The Nature Of The Intrusion Is Unreasonable Because Its Consequences Deprive Students Of The Opportunity To Learn, Earn Academic Credits, And Enroll In Classes.

Another fundamental difference between *Vernonia* and this case is the nature of the intrusion created by drug testing. In *Vernonia*, the Court defined the nature of the intrusion by the consequences of the search: the results of the drug tests are not used for any internal disciplinary function." *See Vernonia*, 515 U.S. at 658. "[T]he search here is undertaken for prophylactic and distinctly nonpunitive purposes." *Id.* at 658 & n.2. In light of these "purposes and consequences," the Court ruled that the nature of the intrusion was "not significant" or unreasonable. *Id.* at 659.

Although this Court stopped short of identifying the consequences that would be sufficiently intrusive to render a suspicion-less, group drug testing policy unconstitutional, one state supreme court struck down a policy that deprived a student of the opportunity to learn, earn academic credits, and enroll in classes. In *Trinidad*, 963 P.2d at 1098, a student who enrolled in a music class for academic credit was required to participate in the extra-curricular marching band in order to remain in this class. *See id.* at 1097 & n.2. One child refused to take the drug tests and, under the policy, he was not allowed to participate in the band. Consequently, he could not remain enrolled in the music class. *See id.* (testimony of Lopez and the band director). Underscoring these harsh consequences, the Colorado Supreme Court struck down the policy as unconstitutional, noting that "In our view, the type of voluntariness to which the *Vernonia* Court referred does not apply to students who want to enroll in a for-credit class that is part of the school's curriculum." *Id.* at 1107.

This conclusion is consistent with *Vernonia* and should be reached here. Like the policy in *Trinidad*, Tecumseh's policy

deprives students of the opportunity to learn, earn academic credits, and enroll in classes if they refuse to submit to drug testing. The district court in *Earls* found that "some faculty members give extra credit to students who participate in certain activities." *See Earls v. Bd. of Educ. of Tecumseh Public Sch. Dist.*, 115 F. Supp. 2d 1281, 1292 (W.D. Okla. 2000). One teacher admitted that "participating in livestock competitions 'can only help the grade, not hurt it'" through extra-credit points. *See id.* at 1292 & n.45. The district court also found that:

> students enrolled in [this teacher's] agriculture classes can earn extra credit, and thus improve their grades, by competing in livestock shows. [This teacher] further testified that teachers "strongly encourage" all agriculture students to be members of the FFA [Future Farmers of America], and to compete in the FFA shows so that they can apply what they have learned in the agriculture class.

Id., at 1292 & n.44 (internal citations omitted).

Tecumseh's Policy also submits students enrolled in academic classes linked to student activities to drug testing, as was the case in *Trinidad*. For example, choir class is a course offered as part of the school's regular curriculum. *See Earls*, 115 F. Supp. 2d at 1291-93. A student can enroll in choir, however, only if she satisfies the school's requirement that she participate in extra-curricular choir activities provided by the school. *See id.* If the student does not participate in extra-curricular choir, she cannot enroll in the academic choir class. *See id.* The consequences of refusing to submit to drug testing, therefore, affect more than voluntarily, non-academic activities: it effectively violates the school's pre-requisite for enrolling in the academic class, which prohibits the student from enrolling in the academic class. *See id.*

Although these findings smack of an unreasonable intrusion, they were not meaningful to the district court in *Earls*. Relying on the school principal's verbal assurance and a provision in the Policy providing that no "academic sanctions will be imposed for violations of this policy," the court ruled that Tecumseh's approach has been to "allow students refusing to consent to drug testing to remain in the corresponding class. *See Earls*, 115 F. Supp. 2d at 1292. The court also ruled, "there is no evidence that students who refuse to consent to drug testing are treated any differently with regard to extra credit than any other non-competitors, or that any students' grades have been lowered because of their refusal to consent to drug testing." *Id*. The appeals court did not address this issue.[8]

These conclusions overlook the crux of *Vernonia's* holding regarding the nature of the intrusion: if the only consequence of a refusal to take a test is the lost opportunity to participate in a voluntary athletic activity, then the intrusion created by the drug test is "not significant." *See Vernonia*, 515 U.S. at 659. However, if a refusal to take a drug test deprives children of a learning opportunity or a chance to improve his or her grades, then this consequence is "significant" and the policy is too intrusive under *Vernonia*. *See Trinidad*, 963 P.2d at 1098. This rule should apply here with equal force: it is undisputed that if students refuse to submit to drug tests, then they cannot participate in the Future Farmers of America (FFA). *See Earls*, 115 F. Supp. 2d at 1291-93. This deprives students of the opportunity to acquire skills and learn lessons from FFA that are directly related to the curriculum in agriculture class. Thus, the district court's emphasis that students can remain enrolled in agriculture class after being removed from FFA overlooks

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[8] It noted, "There are no academic sanctions imposed." *See Earls v. Bd. of Educ. of Tecumseh Public Sch. Dist.*, 242 F. 3d 1264, 1286 (10th Cir. 2001).

the lost opportunity to learn from FFA.

Equally misguided is the district court's conclusion regarding extra-credit. The Tecumseh teacher testified that even though a student who cannot participate in FFA cannot have his or her grade "lowered," the student in fact loses the opportunity to raise his grade. *See id*. at 1292 & n.44-45. The consequence is that students who refuse to submit to testing lose an opportunity to improve a grade merely for refusing to take the drug test. Losing this opportunity could result in a lower overall grade average for a student. These consequences, far from merely losing the opportunity to play football or baseball, are "significant." *See Vernonia*, 515 U.S. at 659. These are precisely the type of intrusions that concerned the Court in *Vernonia*, and that the Colorado Supreme Court sought to prohibit in *Trinidad*, and that the Court should now hold are unreasonable.

D. The Tenth Circuit Correctly Held That The School District's Concern Is Not Immediate Because There Is No Illegal "Drug Crisis," "Rebellion" Or Dramatically Increased Drug Problem In Tecumseh's Schools.

In the balancing analysis set forth in *Vernonia*, courts must assess the immediacy of the governmental concern. In *Vernonia*, the immediacy was clear: "[T]eachers and administrators observed a sharp increase in drug use. Students began to speak out about their attraction to the drug culture, and to boast that there was nothing the school could do about it." *Vernonia*, 515 U.S. at 648. "The administration was at its wits end and…[t]he coincidence of an almost three-fold increase in classroom disruptions and disciplinary reports along with the staff's direct observations of students using drugs or glamorizing drug and alcohol use led the administration to the inescapable conclusion that the rebellion was being fueled by alcohol and drug abuse …." *Id*. at 649. The Court held that

this finding of need and immediacy was the "most significant element" in a case where the "government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care" are implicated. *See Vernonia*, 515 U.S. at 665.

Such immediacy does not exist in *Earls*. As the Tenth Circuit observed:

> the evidence of drug use among those subject to the Policy is far from the 'epidemic' and 'immediate crisis' faced by the Vernonia schools and emphasized by the Supreme Court's opinion. The district court in this case admitted as much: '[a]dmittedly the evidence in this case does not show an epidemic of illegal drug use in the Tecumseh School District.' [citation omitted] Rather, the evidence of actual drug usage, particularly among the tested students, is minimal."

See id. at 1272. Noting the absence of some element of immediacy to the government's concern, the Tenth Circuit stuck down the Policy because of "the *paucity* of evidence of an actual drug abuse problem among those subject to the Policy." *See Id.* at 1277-78 (emphasis added).

This holding is consistent not only with this Court's decision in *Vernonia*, but also with the majority of federal and state court decisions that applied the immediacy of the governmental concern prong of *Vernonia's* suspicion-less search analysis. In *Joy*, 212 F. 3d at 1065, the appeals court ruled that under *Vernonia* analysis, aspects of the suspicion-less searches were unconstitutional because the school "simply has not established that any immediate problem with drugs or alcohol exists for its students in extracurricular activities."[9] *See id.*

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[9] *See* note 9, *supra*.

In *Brooks v. East Chambers Sch. Dist.* , the Fifth Circuit Court of Appeals affirmed a decision to strike down a suspicion-less drug testing policy. The appeals court held that, "In fact, school authorities could not cite a single drug-related injury in seven years, in the course of either school or after school activities." *Brooks,* 730 F. Supp. at 764. There was "no evidence" of immediacy, and the policy was struck down. *Id.* at 761.

In *Tannahill v. ex rel. Tannahill v. Lockney Indep. Sch. Dist.*, 133 F. Supp. 2d 919 (N.D. Tex. 2001), the district court struck down a suspicion-less drug testing policy where "there existed 'very little evidence that drug or alcohol abuse by [the district's] students constituted a major problem in the operation of the schools.'" *Id.* at 924. Without any evidence of immediacy, the court held that the school district was doing that which was constitutionally impermissible: "responding with its [policy] to a perceived public demand that the schools 'do something' about the general societal problem." *Id.*

The facts in these cases sharply contrast those in *Vernonia*, and elsewhere, in which public school administrators and teachers were confronted with genuine emergencies. When the school officials responded to these genuine emergencies, by implementing suspicion-less searches, they were sustained. Findings of immediacy in public schools have included incidents of violence involving guns, knives, other weapons, or some violent threat to the children. *See, e.g., Thompson v. Carthage Sch. Dist.*, 87 F. 3d 979 (8th Cir. 1996) (sustaining searches because of the abundance of evidence that the school had a serious, documented weapons problem that threatened the lives of the students); *In re F.B.*, 726 A.2d 361 (Pa. 1999) (acknowledging that although a "pat down" intrudes on a student's legitimate expectation of privacy, the immediate threat that weapons were present in school justified the searches under the *Vernonia*); *In Interest of S.S.*, 452 Pa. Super. 15, 680 A.2d 1172 (Pa. Super. 1996) (sustaining student searches due

to the high rate of weapons-related violence in Philadelphia's public schools).

Vernonia has not been applied reflexively, however, to uphold suspicion-less, mass searches whenever a school official suspects that a weapon might be present. On the contrary, in the weapons context the *Vernonia* analysis has proven sensitive enough to distinguish between perceived immediacy and genuine "findings of need" that concern weapons. In *Thomas v. Roberts*, 261 F. 3d 1160, 1169 (11th Cir. 2001), a suspicion-less strip search of schoolchildren was struck down under *Vernonia*. The Eleventh Circuit Court of Appeals held, "[n]or is this a case where…school officials receive[d] information that an unidentified student [was] carrying a weapon or other dangerous article on school property, therefore requiring a generalized search to avoid an immediate threat of physical harm to students, faculty, or staff." *See id.* Recognizing that some immediacy was necessary to justify a suspicion-less search of children in the public school setting, the court held that the searches were unconstitutional under *Vernonia*.

This was the approach was adopted by the Tenth Circuit in *Earls v. Tecumseh*:

> the evidence of drug use among those subject to the Policy is far from the "epidemic" and "immediate crisis" faced by the Vernonia schools and emphasized by the Supreme Court's opinion. The district court in this case admitted as much: "[a]dmittedly the evidence in this case does not show an epidemic of illegal drug use in the Tecumseh School District."

See Earls, at 1272-73. Tecumseh's officials were not faced with a knife-slashed bus seat in the midst of a serious, documented weapons problem, as was the case in *Thompson*, 87 F. 3d 979. Nor were the officials facing an alarming rate of weapons-related violence in their public schools, as was the

case in *In Interest of S.S.*, 452 Pa. Super. 15. Most importantly, the immediacy that was present in *Vernonia* does not exist here. In sum, the lack of any immediacy or "finding of need" on this record clearly distinguishes this case from *Vernonia*.[10] In these non-emergent circumstances, Tecumseh should not have abandoned its individualized, suspicion-based searches in favor of mass, suspicion-less searches.

II. AN INFLATED FEAR OF SCHOOL VIOLENCE DOES NOT JUSTIFY MASS, SUSPICION-LESS SEARCHES FOR NON-VIOLENT BEHAVIOR

Despite official crime statistics that show youth crime rates falling significantly,[11] *fear* of out-of-control children has

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[10] The only authority supporting a finding of immediacy on the record in *Earls* is *Miller by Miller v. Wilkes*, 172 F. 3d 574 (8th Cir. 2000). There, the appeals court noted,

> there is not the same immediacy here as there was in Vernonia, and this is where the facts before us differ most significantly from those the Supreme Court faced when declaring Vernonia's drug testing policy constitutional. There is no 'immediate crisis' in Cave City Public Schools, indeed there is no record evidence of any drug or alcohol problem in the schools…

Id. at 580-81. In spite of these findings, the appeals court held that "'the considerable risk of immediate harm once the problem surfaces' is enough" immediacy to sustain the policy. *Id.* This holding is irreconcilable with *Vernonia*, where the Court held that "findings of need" or immediacy is the "most significant element" where the "government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care" are implicated. *See Vernonia*, 515 U.S. at 665. As a result, *Wilkes* should not be applied here to reverse the appeals court's decision.

[11] Since 1997, youth crime in Oklahoma has fallen 20 percent. State of Oklahoma, Uniform Crime Report, Annual Report 2000, Oklahoma State Bureau of Investigation, at 65-66 (2001), www.osbi.state.ok.us/crimestats. Official Oklahoma crime statistics show that crime by juveniles (persons under age 18) today is less frequent than ten years ago. *Id.* (comparing juvenile arrest totals between 1991 and 2000). In 2000, juveniles only accounted for 15.6% of all persons arrested for all crimes in Oklahoma.

increased dramatically over the past several years and driven the *misperception* that school violence is on the rise and associated with drug use. The widespread reporting of rare but dramatic occurrences of school shootings perpetuate frightening and cynical stereotypes about adolescents. Such reports have caused alarmed parents and other community members to think violence in the schools is more common than it is. *See* Tamar Lewin, *Despite Recent Carnage, School Violence Is Not on the Rise,* Dec. 3, 1997, N.Y. Times, at A.16; *see also* Vincent Schiraldi & Jason Ziedenberg, *How Distorted Coverage of Juvenile Crime Affects Public Policy, in Zero Tolerance: Resisting the Drive for Punishment in Our Schools* (William Ayers *et al.*, eds., 2001) [hereinafter *Zero Tolerance*] (media coverage of juvenile crime is badly skewed toward violent, idiosyncratic acts, and presented out of context).

Unfortunately fear of school violence is far greater than violence itself. Although the overall risk of violence and injury at school has remained low and has not changed substantially over the past twenty years, parents report being increasingly apprehensive about their schools. A recent Gallup poll found that nearly half of the parents surveys feared for their children's safety when they sent them off to school, where as only 24 percent of parents reported this concern in 1977. Gallup Organization, *Parents of Children in K-12* (August 24-26,

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Id.

More broadly, there has been a continuing decline nationwide in the rate and number of youth arrested for serious violent offenses (criminal homicide, robbery, aggravated assault and forcible rape). U.S. Dep't. of Justice, Fed. Bureau of Invest., *Crime in the United States: Uniform Crime Reports* (2000, 1998, 1993). Juvenile homicide rates, in particular, have dropped 56 percent from 1993 through 1998. *Id.* All totaled, there has been a 30 percent drop in the total juvenile crime rate. *Id.*; *See also* U.S. Dep't. of Health & Human Services, *Youth Violence: A Report of the Surgeon General*, 17-31 (2001).

No evidence suggests Tecumseh diverges from these state and national trends.

1999). In May 1999, shortly after the shootings at Columbine High School in Littleton, Colorado, 74 percent of parents said that a school shooting was very likely to happen in their community, Gallup Organization, *1025 Adults*(May 7-9, 1999), even though a student has a greater chance of being killed by lightening than by school violence.

In response, school officials are increasingly taking on the issues of school security in a heavy-handed manner. Random drug testing of high school students has proliferated[12] since 1995 when this Court upheld Vernonia's random drug testing policy targeting interscholastic athletics. Such policies, once considered the last resort of frustrated school officials to address serious drug crises in school, 515 U.S. at 649, have now become popular as "necessary" measures. *See* Brief of *Amici Curiae* in Support of Petitioners, National School Board Assoc. *et al.*, at 4 (supporting drug testing because "[o]ne of the most troubling problems with which public schools have had to contend in recent years has been ... the number of violent acts committed at school"); *see also* Brief of *Amici Curiae* in Support of Petitioners, Washington Legal Foundation *et al.*, at 4 ("drug use is strongly correlated to ... violent conduct"). While the use of such strategies seems temptingly effective in combating drug use among teens, the foundation for mass, suspicion-less searches - namely concern for school safety - is belied by research showing that schools are safe and that violence remains an aberration of youthful behavior. More importantly, there is scant evidence nationally linking drug use with school violence, and none whatsoever in Tecumseh. A school district's desire to foster drug abstinence in an environment where there is neither a history of drug use nor

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[12] *See* Brief of *Amici Curiae* in Support of Petitioners, Drug-Free Schools Coalition *et al.*, at 6 & n.3 (citing numerous federal and state court decisions since 1995 reviewing drug and alcohol testing in schools).

violent/criminal activity must not be permitted to make suspicion-less searching become the norm rather than the exception.

A. The Perception That Schools Are Increasingly Violent and That Our Children and Teachers Are Not Safe Is at Odds With Evidence Showing That Schools Are Among the Safest Places to Be.

"America's schools are among the safest places to be on a day-to-day basis." Richard W. Riley & Janet Reno, Introductory Letter to U.S. Dep't. Of Educ. & U.S. Dep't. Of Justice, *Early Warning, Timely Response: A Guide to Safe Schools*, Introduction (1998). By virtually every measure, school crimes are declining. School deaths, the most arresting measure, are very low. "[T]rends throughout the 1990s show that the number of school homicides has been declining." U.S. Dep't of Health and Human Services, *Youth Violence: A Report of the Surgeon General*, 31 (2001). Two nationwide studies of school homicides conducted by the Centers for Disease Control and Prevention in collaboration with the U.S. Departments of Education and Justice concluded that between 1992 and 1999 *school-associated* homicides were less than 1 percent of all homicides among school-age children. *Id.* (emphasis added); *see also* The National School Safety Center, *School Associated Violent Deaths* (Aug. 1999).

Less serious crime in schools has also decreased. Between 1993 and 1999, student reports of physical fights on and off school grounds declined, as did the number of students reported as having brought a gun to school. Nancy D. Brener *et al.*, *Recent Trends in Violence- Related Behaviors Among High School Students*, 282 Journal of the American Medical Association 440-446 (1999). During this same period, non-fatal school crimes in general have decreased: total number of reported school crimes decreased 29 percent; serious violent crimes decreased 34 percent; violent crimes decreased 27

percent; and thefts decreased 29 percent. P. Kauffman *et al.*, U.S. Dept's. Of Education and Justice, *Indicators of School Choice and Safety* (1998 & 2000).

Because rare school shootings broadcast by the media are so horrific, school boards are overreacting.[13] The conclusions of separate surveys of school administrators and high school students - groups at the ground level - suggest a very different school environment than the unsafe one perceived by parents. In *Violence and Discipline Problems in U.S. Public Schools , 1996-1997*, the National Center for Education Statistics (NCES) surveyed a nationally representative sample of 1,234 school principals and disciplinarians at the elementary, middle and high school levels. S. Heaviside *et al.*, U.S. Dep't. of Education, Nat'l Ctr. for Educ. Statistics, *Violence and Discipline Problems in U.S. Public Schools, 1996-1997* (1998, NCES 98-030). When these principals were asked to list what they considered serious or moderate problems in their schools, the most frequently cited problems at all levels were the less violent behaviors such as tardiness (40%), absenteeism (25%), and physical conflicts between students (21%). The critical incidents that are typically the focus of school safety debates were reported to be at least "a moderate problem" only relatively infrequently: drug use (9%), gangs (5%), possession of weapons (2%), and physical abuse of teachers (2%). The NCES report found that violent crime occurred at an annual rate

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[13] Tecumseh's drug policy would not have prevented the widely reported, and most-fear-inducing school shootings in West Paducah Kentucky; Jonesboro, Arkansas; Edinboro, Pennsylvania; Springfield, Oregon; and Littleton, Colorado. None of the student-shooters in those instances reportedly took or used drugs. Schools seeking to employ suspicion-less searches of virtually all students for any and all illicit drug use in order to minimize violence should establish a causal connection between the two. Constitutional imperatives that protect individual rights must not give way to solutions that offer merely cosmetic security.

of only 53 per 100,000 students.[14]

Opinion surveys of high school students also support the fact that schools are safe. Ironically, "[t]oday's high school seniors are no more likely than their parents were to be assaulted, injured, threatened or robbed in high school," according to researchers from the Justice Policy Institute. *See* Vincent Schiraldi *et al.*, Justice Policy Institute, *Schools and Suspensions: Self-Reported Crime and the Growing Use of Suspensions* (2001) <http://www.cjcj.org/sss>. Each year since 1975, researchers from the University of Michigan's Institute for Social Research have conducted the *Monitoring the Future* survey for the United States Justice Department.[15] The survey asks approximately 3,000 high school seniors annually a series of questions about the types of victimization, if any, they have experienced over the past 12 months, in or near school or on a school bus. From 1976 to 1998, between 94% and 95% of students reported that they had not been injured or threatened with injury with a weapon at or near school. The Class of 1998 was only slightly more likely to report being injured or threatened with injury, or to have experienced property damage

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[14] Comparisons of the current NCES survey data with results from an earlier survey of public school principals conducted in 1991 show virtually no changes across either minor misbehavior or more serious infractions. Noted school violence researcher, Irwin Hyman, tracked a number of indicators of school violence over the past 20 years and concluded, "As was the case 20 years ago, despite public perceptions to the contrary, the current data do not support the claim that there has been a dramatic, overall increase in school-based violence in recent years." Irwin A. Hyman and Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices That May Contribute to Student Misbehavior*, 30 Journal of School Psychology 7, 9 (1998); *see also* Russell Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?* 80 Phi Delta Kappan 372 (1999).

[15] *Monitoring the Future* survey results are reported annually in Ann Pastore & Kathleen Maguire, eds., U.S. Dep't. Of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics*.

or theft than the Class of 1976. *See* U.S. Dep't. of Health & Human Services, *Youth Violence: A Report of the Surgeon General*, 31 (2001).

By way of comparison, the *out-of-school* rate of death for children is approximately forty times greater. Melissa Sickmund *et al.*, U.S. Dep't. of Justice, *Juvenile Offenses and Victims: 1997 Update on Violence, Statistics Summary* (1997). Put another way, 99 percent of the violent deaths of children occurred *outside* of school grounds between 1992 and 1994. *Id.* Finally, 90 percent of all childhood deaths take place in or near *home*, not in school, and they take place *after* school. Elizabeth Donohue *et al.*, Justice Policy Inst., *School House Hype: The School Shootings, and the Real Risks Kids Face in America* (1999) <http://www.cjcj.org/sss>.

B. If Permitted, Generalized Drug Testing of Every Public School Student Will Become As Routine & Inflexible as Other "Zero Tolerance" Measures That Punish Children By Depriving Them of School Involvement.

Misperceptions about safety in our schools have led schools to enact "zero tolerance" rules that punish the misbehavior of children by depriving them of school involvement.[16]

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[16] The term "zero tolerance" refers to those policies which deal out severe punishment for all offenses, no matter how minor, ostensibly in an effort to treat all offenders alike in the spirit of fairness and intolerance of rule-breaking. *See, e.g.*, Russell Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?* 80 Phi Delta Kappan 372 (1999) (discussing the origins of zero tolerance); *see also* Russell Skiba, Indiana Educational Policy Center, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice* (Aug. 2000). The use of zero tolerance policies began with federal and state court drug enforcement agencies in the early 1980s. By 1988, these programs had received national attention when the U.S. government allowed customs agents to seize the boats, automobiles and passports of any persons crossing American borders who were found with even trace amounts of

Tecumseh's drug testing policy is a typical example that, if upheld, will advance to other school districts as rapidly as other symbolic "get tough" measures.

Since passage of the Gun Free Schools Act, *supra*, some form of zero tolerance policy has become the norm in public schools.[17] Local school boards have broadened zero tolerance policies beyond the federal mandates of weapons, to include more types of behavior (e.g. drugs, alcohol, threats or swearing). Absurd consequences of this one-size-fits-all mentality have been reported in the past several years. In West Virginia, a seventh grader who shared a zinc cough drop with a classmate was suspended for three days pursuant to the school's anti- drug policy because the cough drop was not cleared with the office. In North Carolina, a six-year-old kissed his classmate (he claimed she asked him to do so); he was suspended for one day for violating the school's rule which precluded "unwarranted and unwelcome touching." In

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drugs. The U.S. Customs Agency finally halted its policy in 1990.

In 1993 school boards across the county began adopting zero tolerance policies. In 1994 the federal government stepped in to mandate the policy nationally with passage of the Gun Free Schools Act into law. 20 U.S.C. § 8921. The law mandates a one calendar year expulsion for possession of a firearm *and* referral to the criminal or juvenile justice systems. Originally the law covered only firearms, but more recent amendments have broadened the language to include *any* instrument that may be used as a weapon. The zero tolerance policies in schools now embrace not only the issues addressed by the Gun Free Schools Act, but are also used to discipline students who "disrupt" classes, *infra*.

[17] Defining zero tolerance as a policy that mandates predetermined consequences or punishments for specified offenses, the National Center for Education Statistics report, *Violence & Discipline Problems in U.S. Public Schools: 1996-1997*, found that 94% of all schools have zero tolerance policies for possession of weapons or firearms, 87% for possession of alcohol, while 79% report mandatory suspensions or expulsions for violence or possession of tobacco. S. Heaviside *et al.*, *supra*.

Louisiana, a second-grader brought his grandfather's watch to school for show and tell. The watch had a one-inch-long pocketknife attached; pursuant to the school's weapons policy, the child was suspended and sent to an alternative school for a month. Russell Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?* 80 Phi Delta Kappan 372 (1999). The ubiquity of these trivial incidents across time and location suggests that the over-extension of school sanctions to minor misbehavior is not anomalous.

It is not the goals of zero tolerance, but the methods of its implementation that deserve scrutiny; methods that unreasonably abandon individual, suspicion-based searches. *See generally*, Part I, *supra*. For example, as a barrier to participating in extra-curricular activities, Tecumseh's drug-testing program does more harm than good because it deprives students of involvement in school and school-related activities. *See also* Part IC., *supra* (Tecumseh Policy unreasonable for depriving students opportunity to learn and earn academic credits). The classic zero tolerance strategy of punishing minor or even trivial events severely, or dramatically extending the length of school suspension or expulsion, has led to a severe and problematic result: many children are missing out on the education their schools are providing.[18] If the Tecumseh school board wants to protect youth and promote further reductions in youth crime, it should keep schools open late, fill them with exciting programs and activities, add healthy food and academic

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[18] Efforts to address school safety have swept millions of school children into a net of exclusion from educational opportunities. Despite relatively stable rates of assaults with and without weapons in schools nationwide over the past 23 years, suspensions and expulsions are at record highs. Between 1974 and 1998, the rate at which students were suspended and expelled from schools has almost doubled from 3.7% of students in 1974 (1.7 million suspended), to 6.8% of students in 1998 (3.2 million suspended). Lloyd Johnston *et al.*, U.S. Dep't. Of Education, *Projected Student Suspension Rate for the Nations's Public Schools* (2000).

support, and help their working parents. Although youth crime was down by 50 percent over the past four years, most youth crime occurs *after* school and *outside* school, in the hours from 3 to 6 p.m. William Ayers *et al.*, *Introduction*, at xiii *in Zero Tolerance*.

Implementing mass, suspicion-less drug testing is also questionable and deserving of scrutiny out of concern that the school district's record-keeping about drug use, an illicit activity, makes students susceptible to prosecution in the juvenile and criminal justice systems. Schools should not be encouraged to become additional sources of referrals to these systems. Admittedly, Tecumseh's drug testing policy does not require prosecutorial referral of students who test positive for drug use, but law enforcement notification is conceivable, and likely, considering the Gun Free Schools Act, 20 U.S.C. § 8921, already requires police department notification for any instance of weapons possession in schools.

The harsh punishments of zero tolerance have come under increasing criticism as arbitrary, unfair and unreasonable. The legal profession joined the chorus in February 2001, when the American Bar Association voted to recommend ending zero tolerance policies for school discipline. The report submitted with the recommendation stated that "zero tolerance has become a one-size-fits-all solution to all the problems that schools confront ... [and has] redefined all students as criminals with unfortunate consequences."

Defenders of zero tolerance policies point to the larger threat posed by serious violence in schools, suggesting that civil rights violations may be an unfortunate but necessary compromise to ensure the safety of school environments. However, this argument is made moot by the almost complete lack of documentation linking zero tolerance with improved school safety. Despite more than ten years of implementation, there have been only a handful of studies evaluating the

outcomes of security measures. Of these, only school uniform research appears to have enough support to be considered even promising in contributions to perceptions of safer school environments. The most extensive studies suggest a negative relationship between school security measures and school safety. Russell Skiba, Indiana Educational Policy Center*Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, at 15 (Aug. 2000). With an almost complete lack of evidence that zero tolerance methods work, less intrusive alternatives for preserving school safety must be used by school officials.

CONCLUSION

For the foregoing reasons *Amici Curiae*, Juvenile Law Center *et al.*, respectfully request that the judgement of the U.S. Court of Appeals for the Tenth Circuit be affirmed.

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Dated: February 6, 2002

APPENDIX - Identity of *Amici*

Juvenile Law Center

Juvenile Law Center (JLC) is one of the oldest legal service firms for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. We believe the juvenile justice and child welfare systems should be used only when necessary, and work to ensure that the children and families served by those systems receive adequate education, and physical and mental health care. JLC is a non-profit public interest firm. Legal services are provided at no cost to our clients.

Advocates for Children of New York

Advocates for Children of New York (AFC) has worked for over 25 years to secure quality and equal public education for children at greatest risk for school-based discrimination and/or academic failure. AFC provides individual case advocacy, technical assistance, and training for parents, students and professionals about children's educational needs and the means of meeting them. AFC engages public policy makers in strategies to modify procedures and practices that negatively impact on young people's academic success. AFC also conducts in-depth analyses of issues affecting academic achievement. Its experience as both researcher and advocate in the field of education allow AFC to provide informed commentary on the policy at issue here. Its offices are in

New York, NY.

Children and Family Justice Center

The Children and Family Justice Center is a holistic children's law center, a clinical teaching program at Northwestern University School of Law's Legal Clinic and a research and policy center engaged with a major urban court, the Juvenile Court of Cook County, in its effort to transform itself into an outstanding and vital community resource. The Northwestern University Legal Clinic has represented children in juvenile and criminal proceedings since its founding in 1969. Today, seven clinical staff attorneys provide legal representation for poor children, youth, and parents in a wide variety of matters, including juvenile delinquency, juvenile transfer, criminal, domestic violence, abuse and neglect, adoption, custody, special education, school suspension and expulsion, immigration and political asylum, and appeals. The staff attorneys supervise second and third year law students in the representation and team with the Center's social worker and the social work students whom she supervises.

Education Law Center-NJ

The Education Law Center (ELC-NJ) is a not-for-profit law firm in New Jersey specializing in education law. Since its founding in 1973, ELC-NJ has acted on behalf of disadvantaged students and students with disabilities to achieve education reform, school improvement and protection of individual rights. ELC-NJ seeks to accomplish these goals through research, public education, technical assistance, advocacy and legal representation. In addition to serving as lead counsel to 300,000 urban school children who are the plaintiffs in New Jersey's school funding case, *Abbott v. Burke*, ELC-NJ provides a full range of direct legal services to parents involved in disputes with public school officials. ELC-NJ serves approximately 600 individual

clients each year, primarily in the area of special education law.

Education Law Center-PA

ELC-PA is a private, non-profit public interest law firm and advocacy organization dedicated to helping Pennsylvania's children obtain a quality education. ELC-PA focuses on the needs of children who are poor, of color, diabled, or otherwise disadvantaged. For more than twenty years, ELC-PA has worked towards improving the quality of public education for students in Pennsylvania through the provision of advice, training, publications and technical assistance to attorneys and advocates, as well through co-counseling and representation of clients in the courts and before administrative and legislative bodies. ELC-PA has participated as amicus curiae in the Pennsylvania Supreme & Superior Courts, as well as this Court.

Juvenile Justice Project of Louisiana

Founded in 1997, the *Juvenile Justice Project of Louisiana* (JJPL) has established itself as a partner in efforts to reform Louisiana's juvenile justice system. We have dedicated ourselves to advocating not only for more effective less expensive alternatives to incarceration, but also for the zealous and effective representation of children in the juvenile justice system. We believe that children in the adjudication stage of proceedings should be afforded all the Fourth Amendment rights afforded adults. Particularly in these times when there are collateral consequences to many juvenile adjudications, a juvenile's right to privacy should be protected. It should not be eroded purely on the grounds of the inaccurate perception that schools are a dangerous place. JJPL is committed to challenging all applications of law that erode students' right to privacy in schools. In order for children to grow and thrive, schools must respect and protect the individual rights of their students just as jealously as those same rights are safeguarded for adults.

Justice Policy Institute

Formed in 1997, the Justice Policy Institute (JPI) is a policy development and research body which promotes effective and sensible approaches to America's justice system. JPI has consistently promoted a rational criminal justice agenda through policy formulation, research, media events, education and public speaking. Through vigorous public education efforts, JPI has been featured in the national media. The Institute includes a national panel of advisors to formulate and promote public policy in the area of juvenile and criminal justice. JPI conducts research, proffers model legislation, and takes an active role in promoting a rational criminal justice discourse in the electronic and print media.

Juvenile Rights Advocacy Project

The Juvenile Rights Advocacy Project is a curricular based law clinic at Boston College Law School representing youth at Brighton High School in Boston as well as representing and advocating for equitable policies for girls in the criminal and juvenile justice systems. In our individual representation and policy work on behalf of girls we encounter school failure as a primary pathway into the justice system.

Lawyers For Children

Lawyers for Children (LFC), founded in 1984, is dedicated to protecting and promoting the health and welfare of vulnerable children. LFC provides free, integrated legal and social work services to over 4,000 individual children per year, in a variety of legal contexts. In addition, LFC publishes guidebooks and other materials for both children and legal practitioners, conducts professional training sessions, and seeks systemic improvement of systems affecting vulnerable children. LFC staff have consulted to other child-focused organizations throughout the country. Its offices are in New York, New York.

National Center for Youth Law

The National Center for Youth Law (NCYL) is a private, non-profit legal organization devoted to improving the lives of poor children in the United States. For more than 25 years, NCYL has provided support services to child advocates nationwide and direct representation in cases involving child welfare, public benefits for children and their families, legal issues involving child and adolescent health, fair housing for families with children, and juvenile justice. In particular, NCYL has participated in litigation focused on the needs of youth in the juvenile justice system throughout the country. NCYL also engages in policy analysis, and administrative and legislative advocacy, on both state and national levels.

The Sentencing Project

The Sentencing Project is a national non-profit organization which since 1986 has challenged over-reliance upon the use of jails and prisons and promoted alternatives to incarceration. Its staff, advisors and consultants have closely observed all aspects of the criminal justice and corrections processes. The Sentencing Project has published some of the most widely-read research and information about sentencing and incarceration, including documentation of a highly disproportionate minority representation in the criminal justice system, the unprecedented growth of the American prison population within the last 30 years, and the relative benefits of using therapeutic treatment, rehabilitation, and social programs to reduce crime. In recent years, as direct, non-judicially-reviewed referral to adult criminal court of juvenile-aged defendants has increased, The Sentencing Project has provided guidance to advocates and information to policymakers intended to limit this practice.

University of the District of Columbia, Juvenile Law Clinic

Faculty and students in the Juvenile Law Clinic of the University of the District of Columbia David A. Clarke School of Law represent children in delinquency matters, children and parents in neglect and special education matters in the District of Columbia.

Youth Law Center

The Youth Law Center (YLC) is a national public interest law firm with offices in San Francisco and Washington, DC, that has worked since 1978 on behalf of children in juvenile justice and child welfare systems. YLC has worked with judges, prosecutors, defense counsel, probation departments, corrections officials, sheriffs, police, legislators, community groups, parents, attorneys, and other child advocates in California and throughout the country, providing public education, training, technical assistance, legislative and administrative advocacy, and litigation to protect children from violation of their civil and constitutional rights. YLC has worked for more than two decades to promote individualized treatment and rehabilitative goals in the juvenile justice system, protection of due process rights of youth at risk, effective programs and services for youth at risk and in trouble, consideration of the developmental differences between children and adults, and racial fairness in the justice system. YLC has also worked on issues involving civil and constitutional rights of children in school, and on the consequences of searches and disciplinary procedures that result in students being referred to the juvenile justice system. Therefore, YLC is particularly interested in the issues in this case.

Law Professors

Associate Professor Theresa Glennon of the James E. Beasley School of Law of Temple University. She teaches, conducts research, publishes and speaks on the legal rights of children and youth, specializing in education and family law. From 1985-1989, she was an attorney at the Education Law Center, a private, non-profit advocacy organization for the educational rights of children.

Professor Martin Guggenheim of the New York University School of Law (NYU) is among the nation's pre-eminent scholars, teachers and practitioners in the area of children's law. At NYU, he is Director of Clinical and Advocacy Programs, Executive Director of Washington Square Legal Services (NYU's free legal services program), and Supervising Attorney of NYU's Family Defense Clinic, which seeks to protect vulnerable families from unwarranted governmental intrusion. He directed NYU's Juvenile Rights Clinic for fifteen years, and currently teaches a seminar entitled Child, Parent & State that explores such issues as the rights of young people and the bases for according young people rights that adults have under the Constitution. As a *pro bono* advocate for children, Professor Guggenheim has litigated innumerable cases in the state and federal courts, and served as chief counsel for the following three cases in the United States Supreme Court: *Schall v. Martin*, 467 U.S. 253 (1984), *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502 (1982), and *Santosky v. Kramer*, 455 U.S. 745 (1982). Professor Guggenheim serves on numerous national and regional boards of directors and advisors for organizations and projects involving children.

Professor Randy Hertz of the New York University School of Law (NYU) is also among the country's leading scholars and teachers in the area of children and the law. He is the Supervising Attorney of NYU's Juvenile Rights Clinic,

and the Editor-In-Chief of the Clinical Law Review, a national, peer-reviewed scholarly journal. Professor Hertz is a current or former member of numerous professional organizations aimed at improving the administration of justice for children. He has published many books and articles on subjects including the legal needs of young people. He is the 2000 recipient of the American Bar Association's Livingston Hall Award for Juvenile Justice Advocacy.

Professor Wallace Mlyniec is the Associate Deal of Clinical Education and Public Service Programs, Lupo-Ricci Professor of Clinical Legal Studies, and Director of the Juvenile Justice Clinic at Georgetown University Law Center. He teaches courses in Family Law and children's rights and assists with the training of criminal defense and juvenile defense fellows in the Prettyman Legal Internship Program. He is the author of numerous books and articles concerning criminal law and the law relating to children and families. Wallace Mlyniec received a Bicentennial Fellowship from the Swedish government of study their child welfare system, the Stuart Stiller Award for public service, and the William Pincus award for contributions to clinical education. He holds his B.S. from Northwestern University and his J.D. from Georgetown University.

Professor Francine Sherman has taught juvenile justice at Boston College Law School for the past nine years, and has been directing the Juvenile Rights Advocacy Project at the law school since it was launched in 1995. She is also the Director of the Boston College Center for Child, Family and Community Partnerships. Professor Sherman represents girls in the Massachusetts juvenile justice system and advocates for state system reform that will improve representation for girls and integrate state systems servicing girls.

Professor Joseph B. Tulman is a Professor of Law and Clinical Director at the University of the District of Columbia, David A. Clarke School of Law (UDC-DCSL). Since 1988, he has director the law school's Juvenile Law Clinic. In 1995, he received the law school's distinguished service award. Professor Tulman, since 1987, has been counsel for plaintiffs in Evans v. Williams, a class action of be half of persons with mental retardation. The suit, filed in 1976 led to the closing in 1991 of Forest Haven, a large institution. An agreement, filed by the Evans parties in 2001, establishes and funds a non-profit organization (The Quality Trust for Individuals with Disabilities) to advance the interests of people with disabilities in D.C. With his colleagues in the UDC DCSL Juvenile Law Clinic, Mr. Tulman has pioneered the use of special education advocacy for children in the neglect and delinquency systems. His publications include articles regarding the unnecessary detention of children, and he co-authored and co-edited a comprehensive manual regarding the use of special education advocacy for children in the delinquency system

Supreme Court, U.S.
FILED
DEC 26 2001
CLERK

No. 01-332

IN THE
Supreme Court of the United States
OCTOBER TERM, 2001

BOARD OF EDUCATION OF TECUMSEH PUBLIC SCHOOL DISTRICT, Independent School District No. 92 of Pottawatomie County, and
TECUMSEH PUBLIC SCHOOL DISTRICT, Independent School District No. 92 of Pottawatomie County,

v.

LINDSAY EARLS AND LACY EARLS, minors, by their next friends and parents, John David and Lori Earls, and

DANIEL JAMES, by his next friend and mother, Leta Hagar

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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TECUMSEH PUBLIC SCHOOL DISTRICT, Independent School District No. 92 of Pottawatomie County,
v.

LINDSAY EARLS AND LACY EARLS, minors, by their next friends and parents, John David and Lori Earls, and

DANIEL JAMES, by his next friend and mother, Leta Hagar

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION, ET AL., IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

INTEREST OF THE AMICI 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. Eliminating drug use in the American public schools presents one of the greatest challenges of the twenty-first century. 3

II. Supreme Court precedent should not be so narrowly interpreted as to exclude testing students who voluntarily participate in non-athletic extracurricular activities. 11

III. *Vernonia* should not be narrowly interpreted to impose what is remarkably similar to an individualized suspicion requirement before allowing schools to enact measures designed to prevent and deter student drug use. 19

CONCLUSION 30

TABLE OF AUTHORITIES

Federal Cases

Case — **Page**

Acton v. Vernonia School District 47J, 796 F.Supp. 1354 (D.Or. 1992), *rev'd*, 23 F.3d 1514 (9th Cir. 1994), *vacated by* 515 U.S 646 , *remanded to* 66 F.3d 217 (9th Cir. 1995) 7

Albach v. Odle, 531 F.2d 983 (10th Cir. 1976) 17

Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) 16

Chandler v. Miller, 520 U.S. 305 (1997) 13

Earls v. Board of Education of Tecumseh Public Sch Dist., 115 F.Supp.2d 1281 (W.D. Okla. 2000) ..... passim

Earls v. Board of Education of Tecumseh Public School District, 242 F.3d 1264 (10th Cir. 2001) ..... passim

Farver v. Board of Education of Carroll County, 40 F.Supp.2d 323 (D.Md. 1999) 17

Ferguson v. City of Charleston, 532 U.S. 67, 121 S.Ct. (2001).. 18

Ferguson v. Phoenix-Talent School Dist., 19 P.3d 943 (Or. App. 2001). 17

Florida v. J.L., 529 U.S. 266 (2000) 9

Gardner v. Tulia Indep. Sch. Dist, 2000 U.S. Dist. LEXIS 20253 (N.D. Tex. 2000) 27

Gardner v. Tulia Indep. Sch. Dist., appeal docketed, No. 00-11404 (5th Cir. Dec. 20, 2001) 27

Goss v. Lopez, 419 U.S. 565 (1974). 17

Indianapolis v. Edmond, 531 U.S. 32 (2000) 22

Joy v. Penn-Harris-Madison Sch. Corp., 212 F.3d 1052 (7th Cir. 2000) 2, 10, 23

Knox County Education Association v. Knox County Board of Education, 158 F.3d 361 (6th Cir. 1998) 22

Linke v. Northwestern School Corporation, 734 N.E.2d 252 (Ind.App.), *on reh'g, transfer granted* (2000), *opinion vacated in 58(a)* (2001). 22

McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802 (1969) 29

McFarlin v. Newport Special School District, 784 F. Supp. 589 (E.D. Ark. 1992) 17

Miller v. Wilkes, 172 F.3d 574 (8th Cir.), *vacated as moot*, 172 F.3d 582(1999) ..... passim

New Jersey v. T.L.O., 469 U.S. 325 (1985) ..... passim

Niles v. Univ. Interscholastic League, 715 F.2d 1027 (5th Cir. 1983) 17

Palmer v. Merluzzi, 689 F.Supp. 400 (D.N.J.1988) 17

Pegram v. Nelson, 469 F.Supp. 1134 D.N.C.1979) 17

Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989) 17

Schaill v. Tippecanoe County Sch. Corp., 864 F2d 1309 (7th Cir. 1988) 3, 10, 15

Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989) 12,13, 20

Spring Branch Indep. Sch. Dist. v. Stamos, 695 S.W.2d 556 (Tex. 1985) 17

Todd v. Rush County Schs., 133 F.3d 984 (7th Cir. 1998) ..... passim

Treasury Employees v. Von Raab, 489 U.S. 656 (1989) 8, 12, 20

United States v. Edwards, 498 F.2d 496 (2d Cir. 1974). 18

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 22

Vernonia School District 47J v. Acton, 515 U.S. 646 (1995) ..... passim

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) 29

Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955). 29

Willis v. Anderson Comm. Sch. Corp., 158 F.3d 415 (7th Cir. 1998) 10

Rules, Regulations and Statutes

20 U.S.C.A. §5812(7)(A) (West 2001) 4

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Other Authorities

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High School and Youth Trends, 2001 Monitoring the Future Study; National Institute on Drug Abuse, http://www.drugabuse.gov/Infofax/HSYouthtrends.html (last visited December 21, 2001) 5

http://www.publicagenda.org/issues/factfiles_detail.cfm?issue_type=illegal_drugs&list=5 (last visited Dec. 20, 2001) .6

Laura Kann, Ph.D, et.al, *Youth Risk Behavior Surveillance – National Alternative High School Youth Risk Behavior* Survery, Center for Disease Control and Prevention, 1998 6

Andrew P. Massmann, *Drug Testing High School and Junior High School Students After Vernonia School District 47J v. Acton: Proposed Guidelines for School Districts*, 31 Val. U. L. Rev. 721 (1997) 11

James M. McCray, *Urine Trouble: Extending Constitutionality to Mandatory Suspicionless Drug Testing of Students in Extracurricular Activities*, 53 Vand. L. Rev. 387 (2000) 10

National Center for Educational Statistics, http://nces.ed.gov/pubs99/condition99/indicator-27.html (last visited Dec. 20, 2001) 6

National Indicator #20, National Education Goals Panel Report, The National Education Goals Panel, http://www.negp.gov/98info/chap2/webpg410.html#20 (1998) 5

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Joanna Raby, *Reclaiming Our Public Schools: A Proposal for School-Wide Drug Testing*, 21 Cardozo L. Rev. 999 (1999) 10

Jacqueline A.Stefkovich, *Drug Testing of Students in Public School: Implications of Vernonia School District v. Acton for Other Types of School-Related Drug Searches*, 113 Ed. Law Rep. 521 (1996). 11

Student's Report of School Crime: 1989 and 1995, U.S. Department of Justice, Bureau of Justice Statistics, School Crime Supplement to the National Crime Victimization Survey, Spring 1989 and 1995 4

Nicholas Zill, et al, *Adolescent Time Use, Risky Behavior and Outcomes: An Analysis of National Data*, U.S. Department of Health & Human Services (1995) 26

INTEREST OF THE *AMICI*[1]

The National School Boards Association (hereinafter "NSBA"), founded in 1940, is a not-for-profit federation of state associations of school boards across the United States, together with the school boards of the District of Columbia, Guam, and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members, who, in turn, govern the nation's 14,722 local school districts.

NSBA has a history of active concern in the area of drug-free schools. NSBA filed as *amicus* in this Court in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) and *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995). The NSBA Beliefs & Policies, which guide the association's actions, contain a strong statement regarding drug abuse in our nation's public schools.

> ***NSBA** supports expanding efforts to address and prevent the problems raised by the use and abuse of ... drugs. NSBA supports efforts to ensure that schools and school-related activities are free from alcohol, tobacco and the aforementioned substances.*

The state school board associations of Colorado, Indiana, New Mexico, Oklahoma, Texas, and Wyoming join the NSBA. The state associations represent all or nearly all of the local public school boards in their respective states. In addition, NSBA is joined by the Texas Association of School Boards ("TASB") Legal Assistance Fund, which is composed of nearly 750 Texas school districts. The TASB Legal Assistance Fund is governed by three organizations: the

[1] The Amici file this brief with the consent of all parties. No counsel for a party authored this brief in whole or in part. No person or entity, other than the Amici, their members or their counsel made a monetary contribution for the preparation or submission of this brief.

Texas Association of School Boards, the Texas Association of School Administrators, and the Texas Council of School Attorneys.

Penn-Harris-Madison School Corporation is a public school district in northern Indiana, enrolling over 9,000 students. The district was party in the suit, *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052 (7th Cir. 2000).

Joining with this group of educators is W.A. Drew Edmondson, as Attorney General of the State of Oklahoma. The Office of the Attorney General has an active interest in combating juvenile drug use.

The issues of drugs in the schools and maintaining a safe environment for students are of major concern to school districts and law enforcement officials throughout the country.

SUMMARY OF THE ARGUMENT

Drugs are one of the most serious problems facing the American public school system today. Where traditional methods of anti-drug education have failed to stop the proliferation of drugs in the schools, many school boards have turned to programs of random, suspicionless drug testing in reliance on this Court's decision in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995).

The decision of the *Earls* majority below unnecessarily restricts the availability of random, suspicionless drug testing under *Vernonia* in two ways. First, the *Earls* majority gave little weight to the fact that the Tecumseh school board ("Tecumseh") sought only to test students who volunteered to participate in extracurricular activities. The courts that have approved student drug testing policies, including this Court in *Vernonia*, have all made it clear that the voluntary

nature of the activities in question greatly reduced the privacy interests of the students involved. The fact that *Vernonia* only dealt with student athletes was not dispositive to that decision.

Second, by requiring the school district to present evidence of serious drug use among the specific student groups to be tested, the *Earls* majority usurped the school board's responsibility for managing the school district and imposed a requirement at odds with the stated goal of deterrence. While the "epidemic" of drug use found in *Vernonia* was a factor to be weighed against the students' privacy interests, it was not a determinative requirement.

ARGUMENT

I. Eliminating drug use in the American public schools presents one of the greatest challenges of the twenty-first century.

The plague of illicit drug use which currently threatens our nation's schools adds a major dimension to the difficulties the schools face in fulfilling their purpose - the education of our children. If the schools are to survive and prosper, school administrators must have reasonable means at their disposal to deter conduct which substantially disrupts the school environment.[2] As we enter the twenty-first century, American public schools are no longer expected merely to teach reading, writing, and arithmetic. Schools are now required to provide instruction in subjects as diverse as health education, sex education, and morality. Public schools are also being asked to shoulder the burden of feeding students breakfast and lunch, offering before and

[2] *Schaill v. Tippecanoe County Sch. Corp.*, 864 F2d 1309, 1324 (7th Cir. 1988).

after school child care services, and providing medical and psychological services.

The changing role of the American public schools reflects the changes in our society in general. As society is impacted by the plagues of drugs and violence, so too are the schools and the educational environment. For at least the past twenty years, the United States has publicly committed itself to the *War Against Drugs*. One of the eight National Education Goals passed by Congress in 1994 was that: "By the year 2000, every school in the United States will be free of drugs, violence, and the unauthorized presence of firearms and alcohol and will offer a disciplined environment conducive to learning."[3] The Safe Schools Act of 1994[4] was passed in part to help schools achieve their drug-free goal. It is within this context that schools must also ensure that the environment within their buildings is safe and conducive to learning.

A significant element in providing a safe and effective learning environment is the elimination of drugs and violence on school property and the deterrence of drug use among the student population. One of the most troubling problems with which public schools have had to contend in recent years has been the increase in the availability of drugs at school, the use of drugs by students, and the number of violent acts committed at school. According to a recent survey, 65.3 percent of students aged 12 through 19 reported that drugs were available at school.[5] That same survey

[3] 20 U.S.C.A.§5812(7)(A) (West 2001).

[4] 20 U.S.C.A.§5961(b) (West 2001).

[5] *Students' Report of School Crime: 1989 and 1995*, U.S. Department of Justice, Bureau of Justice Statistics, School Crime Supplement to the National Crime Victimization Survey, Spring 1989 and 1995.

noted that 14.6 percent of the student population reported they had been victimized at school. Several other studies have tracked illicit drug use by students in grades 8 through 12 and have concluded that drug use by students continues to be a problem. The *1998 National Education Goals Panel Report* showed that 40 percent of 10th graders used illicit drugs in 1997; which was up from 24 percent in 1991.[6] For the year 2000 the University of Michigan reported that 53.9 percent of high school seniors had used an illicit drug by the time they reached their senior year of high school.[7]

As stated by the Director of the National Institute on Drug Abuse, "Since 1991 drug use has been increasing among America's youth. To counter these trends, we must strengthen drug abuse prevention efforts at the Federal, State, and local levels."[8] The National Center for Educational Statistics reports the following:

- [A]fter reaching its lowest point in the early 1990s, drug use at any time during the previous year by high school seniors began to increase again for most drugs. For example, the percentage of seniors who reported using marijuana at any time during the previous year increased from 22 percent in 1992 to 38 percent in 1998.

- Between 1991 and 1998, the percentage of 8th, 10th, and 12th graders who reported using marijuana, smoking cigarettes, or using any illicit drug other than marijuana in the previous 30 days increased.

- In 1998, more 8th, 10th, and 12th graders reported that it would be "fairly easy" or very easy to obtain marijuana than did their counterparts in 1992.[9]

Other reports relate that 40.9 percent of high school seniors and 36.4 percent of high school sophomores indicate they used illegal drugs in the previous year.[10] One third of the nation's secondary students reported they had been offered, sold, or given an illegal drug on school property.[11]

Drug use affects a student's mind and body. This Court has already recognized that "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe."[12] Additionally, studies also show that some discipline problems in school, such as fighting, truancy, and vandalism, correlate with student use of

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[6]*National Indicator #20, National Education Goals Panel Report*, The National Education Goals Panel, http://www.negp.gov/98info/chap2/webpg410.html#ind20 (1998).

[7]*High School Youth Trends, 2001 Monitoring the Future Study*, National Institute on Drug Abuse, http://www.drugabuse.gov/Infofax/HSYouthtrends.html, December 21, 2001.

[8]National Institute on Drug Abuse, National Institutes of Health, *Preventing Drug Use among Children and Adolescents: A Research Based Guide* (1997).

[9]National Center for Educational Statistics, http://nces.ed.gov/pubs99/condition99/indicator-27.html (last visited Dec. 20, 2001).

[10]http://www.publicagenda.org/issues/factfiles_detail.cfm?issue_type= llegal_drugs&list=5 (last visited Dec. 20, 2001).

[11]Laura Kann, Ph.D., et al., *Youth Risk Behavior Surveillance–National Alternative High School Youth Risk Behavior Survey*, Centers for Disease Control and Prevention (1998).

[12]*Vernonia*, 515 U.S. 646, 661 (1995).

alcohol and other drugs.[13] This correlation was evident in *Vernonia School District 47J v. Acton*,[14] this Court's leading case involving student drug use, where administrators and teachers reported a direct correlation between rising drug use and the number of disciplinary referrals, which had doubled since the early 1980s.[15] Finally, students impaired by drugs not only affect their own learning but disrupt the learning of others and the overall educational environment. This Court has noted that the effects of a drug-infested school "are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted."[16]

While schools have taught health education for many years and have been given federal dollars for drug education programming, studies indicate that classroom instruction is simply not enough. Even the district court in *Vernonia* noted that "[s]imply telling [students] that drug use is bad for their health and that they should stop using is invariably ineffective."[17] As a consequence, many school boards have had to turn to other methods of curbing drug use. One of the most effective methods is the deterrent effect of random drug-testing. The policy adopted by Tecumseh is typical of the policies adopted by school districts across the nation in

[13]*See e.g.* B. Bowman, *Aggressive and Violent Students; Statistics on Violence*, Developmental Resources, Inc. (1994).

[14]515 U.S. 646 (1995).

[15]*Id.* at 648-649.

[16]*Id.* at 661.

[17]*Acton v. Vernonia School District 47J*, 796 F.Supp. 1354, 1357 (D.Or. 1992), *rev'd*, 23F.3d 1514 (9th Cir. 1994), *vacated by* 515 U.S. 646, *remanded to* 66 F.3d 217 (9th Cir. 1995).

the wake of this Court's *Vernonia* decision. Such policies are designed to identify and help students who are using drugs, and to protect other students from the disruption and dangers posed by students using illegal drugs. They are not designed to be punitive. Under the Tecumseh policy, if a student tests positive the student is not disciplined or punished academically; instead, the student and the student's parent are offered help, such as a student assistance program or a drug rehabilitation program.[18] The Tecumseh school board has undertaken its responsibility in "furtherance of [its] responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."[19]

In 1995, this Court offered public schools a potent weapon in their fight against drug use by students. In *Vernonia School District 47J v. Acton*,[20] the Court allowed a school district to randomly and without individualized suspicion test the school's student athletes for drug use. Drug tests are searches governed by the Fourth Amendment,[21] and the *Vernonia* decision was grounded in this Court's earlier landmark school search case, *New Jersey v. T.L.O.*[22]

In *T.L.O.*, this Court recognized the public school setting presents special circumstances that demand

[18]*Earls v. Board of Education of Tecumseh Public Sch. Dist.*, 115 F.Supp.2d 1281, 1291 n.40 (W.D. Okl. 2000).

[19]*Vernonia*, 515 U.S. at 665.

[20]515 U.S. 646 (1995).

[21]*See id.* at 652; *see also Treasury Employees v. Von Raab*, 489 U.S. 656, 665 (1989).

[22]469 U.S. 325 (1985).

accommodations of the usual Fourth Amendment requirements.[23] The *T.L.O.* Court concluded that instead of requiring "probable cause" to justify a search, school officials need only meet the lower "reasonable suspicion" standard.[24] After reviewing *T.L.O.* and other cases dealing with the limited nature of student rights in the public schools, the *Vernonia* Court concluded that "while children assuredly do not shed their constitutional rights ... at the schoolhouse gate, the nature of those rights is what is appropriate for children in school."[25]

Since *Vernonia*, courts across the nation have split on the question of what factors made the random drug testing program in *Vernonia* constitutional. Specifically, two major questions have arisen:

1) Is *Vernonia* limited to students participating in athletics, or may schools test students who join other voluntary, extracurricular activities?

[23] *Id.* at 337-40; "Fourth Amendment rights . . . are different in public schools than elsewhere, the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children" *Vernonia*, 515 U.S. at 656.

[24] *T.L.O.*, 469 U.S. at 341.

[25] *Vernonia*, 515 U.S. at 655-56 (internal citations omitted); *see also Florida v. J.L.*, 529 U.S. 266 (2000) in striking down a *Terry* "stop and frisk" search based upon an anonymous tip, the Court noted that "[n]or do we hold that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as airports and *schools*, cannot conduct protective searches on the basis of information insufficient to justify searches elsewhere."(emphasis added) *Id.* at 274.

2) What evidence must a school district present of current drug use to justify random, suspicionless drug testing?

Until the Tenth Circuit's decision below,[26] the Courts of Appeals appeared to agree that school districts could require students participating in non-athletic extracurricular activities to undergo random, suspicionless drug testing, without proving epidemic drug use among the narrow groups of students to be tested.[27] *Earls* is the only federal appellate court to interpret *Vernonia* as allowing random drug screenings only for students engaged in interscholastic athletic competition. The analysis in *Vernonia* warrants a broader interpretation than the one provided by the Tenth Circuit.[28] *Amici* believe the majority essentially articulated

[26] *Earls v. Board of Education of Tecumseh Public School District*, 242 F.3d 1264 (10th Cir. 2001).

[27] *See, e.g., Schaill v. Tippecanoe County Sch. Corp.*, 864 F2d 1309 (7th Cir. 1988); *Todd v. Rush County Schs.*, 133 F.3d 984 (7th Cir. 1998); *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999), *vacated as moot*, 172 F.3d 582 (June 15, 1999). *Joy v. Penn-Harris Madison Sch. Corp.*, 212 F.3d 1052 (7th Cir. 2000). Although the Tenth Circuit below noted that the Seventh Circuit struck down a student drug testing policy in *Willis v. Anderson Comm. Sch. Corp.*, 158 F.3d 415 (7th Cir. 1998), the policy in *Willis* required drug testing for all students who had been suspended for three days, regardless of the reason, as a condition of returning to school. *Id.* at 417. Failure to comply with the testing or failure to participate in a drug education program could result in additional punishment, including expulsion. *Id.* As such, *Willis* involved the exact situation that Justice Ginsburg noted was *not* at issue in *Vernonia*. *Vernonia*, 515 U.S. at 666 (Ginsburg, J., concurring). In light of the importance placed on the voluntary nature of the extracurricular activities at issue by the courts in cases like *Vernonia*, *Todd*, and *Miller*, and by the school district in this case, *Willis* is simply inapplicable to the issues at hand.

[28] *See, e.g.*, James M. McCray, *Urine Trouble: Extending Constitutionality to Mandatory Suspicionless Drug Testing of Students in Extracurricular Activities*, 53 Vand. L. Rev. 387 (2000); Joanna Raby, *Reclaiming Our Public Schools: A Proposal for School-Wide Drug*

the standards for analyzing the constitutionality of Tecumseh's policy, but failed to follow those articulated standards.[29] Specifically, *Amici* believe the *Earls* majority gave too little weight to the voluntary nature of the activities in question, and too much weight to the alleged drug "epidemic" alleged to have existed in *Vernonia*.

II. Supreme Court precedent should not be so narrowly interpreted as to exclude testing students who voluntarily participate in non-athletic extracurricular activities.

In its majority opinion below, the Tenth Circuit appeared to fear that Tecumseh's policy was merely a prelude to testing every public school student as a prerequisite for attending school.[30] Such fears are completely unfounded; while it is true that Tecumseh's policy goes further than the policy approved by this Court in *Vernonia*, in that it would apply to students who voluntarily participate in non-athletic extracurricular activities, it does not reach the question specifically reserved by Justice Ginsberg in her concurring opinion in *Vernonia*, *i.e.* whether a school can test "all

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Testing, 21 Cardozo L. Rev. 999 (1999); Andrew P. Massmann, *Drug Testing High School and Junior High School Students After Vernonia School District 47J v. Acton: Proposed Guidelines for School Districts*, 31 Val. U. L. Rev. 721 (1997); Jacqueline A. Stefkovich, *Drug Testing of Students in Public School: Implications of Vernonia School District v. Acton for Other Types of School-Related Drug Searches*, 113 Ed. Law Rep. 521 (1996).

[29] "I diverge with the majority only where, once again, I believe it has not actually followed the articulated conclusions and standards it has set forth for itself." *Earls*, 242 F.3d at 1283 (Ebel, J., dissenting).

[30] "Without any limitation, schools could test all of their students simply as a condition of attending school." *Earls*, 242 F.3d at 1278.

students required to attend school."[31] As will be shown below, the voluntary nature of the extracurricular activities subject to testing has been a critical component of all approved policies.

This Court has repeatedly held that a suspicionless search unsupported by either probable cause or a warrant is justified by the existence of "special needs, beyond the normal need for law enforcement...."[32] In *T.L.O.*, this Court concluded that public schools meet the "special needs" requirement in general, without any need to examine the factual circumstances of the specific school in question.[33] In *Vernonia*, the Court confirmed that like in the federal customs industry (*Von Raab*) and the railroad industry (*Skinner*), "[w]e have found such 'special needs' to exist in the public schools context."[34] In determining that "special needs"

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[31] *Vernonia*, 515 U.S. at 666 (Ginsburg, J., concurring).

[32] *Vernonia*, 515 U.S. at 653 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

[33] *See T.L.O.*, 469 U.S. at 340-41.

[34] *Vernonia*, 515 U.S. at 653. In neither *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989), nor *Treasury Employees v. Von Raab*, 489 U.S. 656, 665 (1989) did the Supreme Court rely on evidence of a drug problem in the *specific group* to be tested. *Skinner* upheld a program of suspicionless drug-testing in the railroad industry based on evidence of a drug problem in the industry nationwide, without any evidence that the specific railroad in question had a similar problem, *see Skinner*, 489 U.S. at 607; and *Von Raab* approved the suspicionless drug-testing of customs officials without any evidence of a drug problem in the industry. *Von Raab*, 489 U.S. at 673. *See also Miller v. Wilkes*, 172 F.3d 574, 578 (8th Cir. 1999) "The Supreme Court has held that the public school environment provides the requisite 'special needs' so that a school district may dispense with those Fourth Amendment protections." The fact that *Miller* was vacated on the grounds of mootness does not diminish its status as persuasive authority in this case. The Eighth Circuit's decision to vacate the opinion as moot was made based on the

existed, the *Vernonia* Court did not consider the specific factual evidence of a drug problem in the Vernonia schools; that evidence was only considered later, as part of the subsequent balancing test.[35]

This Court has cautioned that "[a]s the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness'."[36] The reasonableness of a given search is judged by use of a balancing test:

> The permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate, governmental interests.[37]

In *Vernonia*, this Court identified three factors to consider in balancing the parties' respective interests:

1. the nature of the privacy interest upon which the search intrudes;
2. the character of the intrusion;[38]

fact that all the students bringing the legal challenge in that case had graduated by the time the rehearing occurred. *Miller*, 172 F.3d at 582.

[35]*Vernonia*, 515 U.S. at 662-663; *see also Chandler v. Miller*, 520 U.S. 305 (1997) (noting that a demonstrated problem of drug abuse is "not in all cases necessary to the validity of a testing regime." *Id.* at 319.

[36]*Vernonia*, 515 U.S. at 652.

[37]*Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 619 (1989); *see also Miller*, 172 F.3d at 578.

[38]The second *Vernonia* factor " the character of the intrusion complained of " does not appear to be at issue in this appeal. The Tecumseh policy is virtually identical to that approved of by this Court in *Vernonia*. The Court found that requiring a student to produce a urine

3. the nature and immediacy of the governmental concern at issue, and the efficacy of the chosen means for meeting it.[39]

In considering the nature of a student's privacy interest in the context of drug testing, this Court stated that "[c]entral, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster."[40] This Court emphasized that the nature of a school district's power over schoolchildren "is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[41]

As discussed above, the major difference between *Vernonia* and the Tecumseh policy is the greater inclusiveness of the Tecumseh policy, *i.e.* it covers all students participating in extracurricular activities, as opposed to limiting the program to student athletes. However, in *Todd* the Seventh Circuit held that this difference did not render a student drug testing program unconstitutional:

sample with either minimal direct observation (for male students) or no direct observation (for female students) duplicates the conditions anyone using a public restroom must face. The Court therefore ruled that the intrusion on a student's privacy interests in obtaining the urine sample was "negligible." *Id.* at 658. Even the *Earls* majority court conceded that the Tecumseh policy did not constitute a significant invasion of a student's privacy. *Earls*, 242 F.3d at 1276.

[39]*Vernonia*, 515 U.S. at 654-660.

[40]*Id.* at 654.

[41]*Id.* at 655.

> [W]e find that the reasoning compelling drug testing of athletes also applies to testing of students involved in extracurricular activities. Certainly successful extracurricular activities require healthy students.[42]

While it is true that *Vernonia* noted that student athletes have a lower expectation of privacy due to the circumstances in which they change before and after sporting events, this "locker room" argument was *not* intended to suggest that non-athlete students have an adult citizen's full expectation of privacy.[43] To the contrary, *Vernonia* prefaced the "locker room" discussion by noting that *all* students are "routinely required to submit to various physical examinations and to be vaccinated against various diseases,"[44] and that because of these medical examinations, "students within the school environment have a lesser expectation of privacy than members of the population generally."[45] This Court discussed at some length the reduced constitutional rights of

[42]*Todd*, 133 F.3d at 986; *see also Miller*, 172 F.3d at 578-79 ("Pathe argues that the fact that the policy in *Vernonia* applied only to student athletes was more significant to the Supreme Court in reaching its decision than was the fact that the policy applied to students who were attending public school. We read the case differently.").

[43] "The Court did say that '[l]egitimate privacy expectations are even less with regard to student athletes.' That is not to say, however, that it is only the student who seeks to engage in extracurricular school sports activities whose legitimate expectation of privacy is so diminished that a search such as this one can stand up to constitutional scrutiny." *Miller*, 172 F.3d at 579.

[44]*Vernonia*, 515 U.S. at 656.

[45]*Id.* at 657 (quoting *T.L.O.*, 469 U.S. at 348) (Powell, J., concurring).

all public schools students, noting that "for many purposes, school authorities ac[t] *in loco parentis*."[46]

With respect to the non-athlete students participating in extracurricular activities in Tecumseh, the district court noted that there was evidence in the record that such students traveled out of town and out of state more frequently than the general student population, sometimes sleeping together in a dormitory setting, sharing motel rooms, or sharing communal restroom facilities.[47] Even the *Earls* majority eventually conceded that "like athletes, participants in other extracurricular activities have a somewhat lesser privacy expectation than other students."[48] For the purpose of the *Vernonia* balancing test, therefore, *all* students participating in extracurricular activities have a lower expectation of privacy than the already reduced expectation of students in general.

Vernonia also stressed that another factor reducing the privacy expectations of student athletes is the voluntary nature of student athletics; that because a student chooses to "go out for the team," he or she "ha[s] reason to expect intrusions upon normal rights and privileges, including privacy."[49] This argument is true of all students who participate in extracurricular activities and was given short shift by the *Earls* majority. The Seventh Circuit has twice found that the voluntary nature of extracurricular activities

[46]*Id.* at 655 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986)).

[47]*Earls v. Board of Education of Tecumseh Public Sch. Dist.*, 115 F.Supp.2d 1281, 1290 n.34 (W.D. Okl. 2000).

[48]*Earls*, 242 F.3d at 1276.

[49]*Vernonia*, 515 U.S. at 657.

justifies drug testing *all* students participating in extracurricular activities, due to their reduced privacy interests.[50] Any student who elects to participate in an extracurricular activity voluntarily agrees to accept additional responsibilities,[51] including participating in a drug testing program. Participation in extracurricular activities is a privilege, not a right[52] school districts are not obligated to offer extracurricular activities. This Court should not consider the fact that the target students of the Vernonia program were athletes, as opposed to participants in any other extracurricular activity, dispositive.

By essentially ignoring the voluntary nature of the non-athletic extracurricular activities at issue below, the *Earls* majority contradicts this Court's "special needs" analysis:

[50]*See Todd*, 133 F.3d at 986; *Schaill*, 864 F2d at 1319.

[51]Students participating in extracurricular activities face additional admission requirements, *Earls*, 115 F.Supp.2d at 1289-90; and students can be removed from participation for different and often more strict disciplinary regulations, *see Todd*, 133 F.3d at 986; *Albach v. Odle*, 531 F.2d 983, 984-85 (10th Cir. 1976), and with less formal due process procedures. *Pegram v. Nelson*, 469 F.Supp. 1134, 1142 (D.N.C. 1979); *Goss v. Lopez*, 419 U.S. 565, 578 (1974).

[52]*Todd v. Rush County Schools*, 133 F.3d 984, 986 (7th Cir. 1998); *see also Poling v. Murphy*, 872 F.2d 757, 764 (6th Cir. 1989) (no protected right to participate in student council elections); *Niles v. Univ. Interscholastic League*, 715 F.2d 1027, 1029 (5th Cir. 1983); *Farver v. Board of Education of Carroll County*, 40 F.Supp.2d 323 (D.Md. 1999); *McFarlin v. Newport Special School District*, 784 F. Supp. 589, 592-93 (E.D. Ark. 1992); *Palmer v. Merluzzi*, 689 F.Supp. 400 (D.N.J. 1988); *Spring Branch Indep. Sch. Dist. v. Stamos*, 695 S.W.2d 556, 561 (Tex. 1985) ("students do not possess a constitutionally protected interest in their participation in extracurricular activities."); *Ferguson v. Phoenix-Talent School Dist.*, P.3d 943 (Or. App. 2001).

> An essential, distinguishing feature of the special needs cases is that the person searched has consented, though the usual voluntariness analysis is altered because adverse consequences, (e.g. dismissal from employment or disqualification from playing on a high school sports team), will follow from refusal. The person searched has given consent, as defined to take into account that the consent was not voluntary in the full sense of the word.[53]

Our nation has daily reminders that in some situations certain privileges are conditioned on additional constraints and intrusions -- we submit to screening when we fly on a commercial aircraft or enter a government building. As Judge Friendly has noted, passengers who do not want to be searched at airports can avoid such searches by voluntarily choosing not to travel by air.[54] Likewise, students who do not wish to be drug tested can avoid such testing by voluntarily choosing not to participate in extracurricular activities.

The Tenth Circuit suggests the need for the distinction between athletes and students participating in other extracurricular activities, because "[w]ithout any limitation, schools could test all of their students simply as a condition of attending school."[55] This ignores, however, the critical distinction between using drug screening as a precondition to public education, and using drug screening as a precondition to participation in voluntary extracurricular

[53]*Ferguson v. City of Charleston*, 121 S.Ct. 1281, 1295 (2001) (Kennedy, J., concurring).

[54]*United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974).

[55]*Earls*, 242 F.3d at 1278.

activities. In her concurrence in *Vernonia*, Justice Ginsburg noted that the majority opinion was limited to students who voluntarily participate in interscholastic athletics and would not necessarily extend to all students who attend public schools.[56] Tecumseh is *not* asking its students to surrender their state constitutional right to access a public education, but is conditioning the participation in extracurricular activities -- which is a privilege, not a right -- on that concession. If students wish to exercise their privilege to participate, they must abide by a higher standard of conduct, and surrender themselves to greater scrutiny than students in the general attendance.

III. *Vernonia* should not be narrowly interpreted to impose what is remarkably similar to an individualized suspicion requirement before allowing schools to enact measures designed to prevent and deter student drug use.

The *Earls* majority's greatest problem with the Tecumseh policy stemmed from the application of the third *Vernonia* factor - the nature and immediacy of the governmental concern, and the efficacy of the chosen means for meeting it. In essence, the *Earls* majority determined that Tecumseh had not produced enough evidence to show that it suffered from the sort of "drug rebellion" of "epidemic proportions" that supposedly existed in Vernonia.[57] The difficult question facing this Court, then, is when may schools implement drug testing policies in situations that are not "rebellions" and "epidemics"? This Court has previously approved of random, suspicionless drug testing in the railroad industry based on evidence of a drug problem in the industry

[56] *Vernonia*, 515 U.S. at 666 (Ginsburg, J. concurring).

[57] *See id.* at 662-63.

nationwide, without any evidence that the specific railroad in question had a similar problem,[58] and in the customs industry without any evidence of a drug problem in the industry.[59] Even the *Earls* majority backtracked towards the end of its opinion and acknowledged that a "drug epidemic" is not required before testing may begin:

> We do not suggest that a school must wait until it can identify a drug abuse problem of epidemic proportions before it may drug test groups of its students. Nor do we declare any bright line mark concerning the magnitude at which a drug problem becomes severe enough to warrant a suspicionless drug testing policy. We leave that to each school district.[60]

So where should the line be drawn?

Amici believe that it should be drawn well short of the standard suggested by the *Earls* majority, which would require schools to "demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem."[61] As Judge Ebel perceptively noted, this test conflicts with *Vernonia* because it would essentially reimpose the "special needs" requirement at the end of the analysis by requiring the school district to show that its policy was adopted in response to a "documented drug abuse problem," which the

[58] *Skinner*, 489 U.S. at 607.

[59] *Von Raab*, 489 U.S. at 673.

[60] *Earls*, 242 F.3d at 1278.

[61] *Id.*

Earls majority had previously determined was a major component of the "special needs" analysis.[62]

The high level of evidence of documented drug use by the specific groups of students to be tested required by the *Earls* majority ignores the fact that this is a *balancing* test. As Judge Ebel notes in his dissenting opinion, "the majority appears to forget its earlier conclusion that there is just not much for the school district's interests to be weighed against."[63] If the privacy interests of students participating in extracurricular activities are truly diminished and the intrusion of their privacy is "not significant,"[64] then under the balancing test called for in *Vernonia* and similar cases, the balance would tip in favor of the student plaintiffs only if the interests of the school district were "truly insignificant."[65] However, in *Vernonia* this Court noted that deterring drug use among our nation's students is "important, perhaps compelling."[66] How can such a balance be said to tip in favor of the students, considering what weights are placed on each side of the scales? It is clear that the *Earls* majority treated the *Vernonia* factors not as issues to be balanced against each other, bur rather as three distinct elements, each

[62] *Id.* at 1281-83 (Ebel, J., dissenting). This argument also contradicts the majority's initial concession that *Vernonia* stood for the proposition that the public schools meet the "special needs" requirement in general, without the need to show a particular drug problem. *See Earls*, 242 F.3d at 1270; "I agree with the majority that, under *Vernonia* ... a public school district need not demonstrate a particularized 'special need' to randomly test students engaged in extracurricular activities for illegal drug use." *Id.* at 1279 (Ebel, J., dissenting).

[63] *Earls*, 242 F.3d at 1283 (Ebel, J., dissenting).

[64] *Id.* at 1276.

[65] *Id.* at 1283 (Ebel, J., dissenting).

[66] *Vernonia*, 515 U.S. at 661.

of which the school district was required to separately establish. By doing so, the Tenth Circuit essentially re-imagined the "individualized suspicion" requirement as a sort of "associational suspicion" requirement. As this Court has noted with regards to the individualized suspicion of wrongdoing, however, "the Fourth Amendment imposes no irreducible requirement of such suspicion."[67]

Amici respectfully submit that requiring schools to present evidence of documented drug use among each subcategory of students they wish to test, as was required below, is both unworkable and inconsistent with *Vernonia*, *Skinner*, and *Von Raab*. The problem with direct evidence is that it is not particularly useful; by the time a student dies of a drug overdose from drugs received at school, it is too late for the school to do anything to help him.[68] By the time the district court considered the situation in *Vernonia*, the student body was apparently in a "state of rebellion." The more logical approach to this problem has been taken by courts such as the Eighth Circuit, which has noted that, "It is in the public interest to endeavor to avert the potential for damage, both to students who abuse and to those students, teachers, family members, and others who are collaterally affected by the abuse, before the problem gains a foothold."[69]

[67] *T.L.O.*, 469 U.S. at 342 n.8 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976)); *see also Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (holding that individualized suspicion "is not an irreducible component of reasonableness").

[68] *See, e.g., Linke v. Northwestern School Corpotation*, 734 N.E.2d 252 (Ind.App.), *on reh'g, transfer granted, opinion vacated in 58(a)* (2001).

[69] *Miller v. Wilkes*, 172 F.3d 574, 576 (8th Cir. 1999); *see also Knox County Education Association v. Knox County Board of Education*, 158 F.3d 361 (6th Cir. 1998)(holding that there need not be proof of a "pronounced" drug problem among teachers in a school before the school can constitutionally implement a drug testing program for safety-sensitive employees).

Because of the nature of drug use, it is rare that schools can prove it directly. Instead, most schools discover that they have drug problems based upon student self-confessed drug use revealed during annual surveys. Just as the University of Michigan conducts annual statistical surveys on student drug use on a national basis for the *Monitoring the Future Study*, so too, most states conduct statewide and districtwide surveys. Thus, for example, in *Joy v. Penn-Harris-Madison School Corporation*, the court had before it extensive evidence that the school had a very serious drug problem, with students being above the national and state averages in most categories of drug use.[70] However, self-reporting surveys cannot provide the associational or "group-specific" evidence required by the *Earls* court, because as survey questions require more self-identification by students (such as groups to which they might belong), the students' answers are likely to become less truthful due to the fear of disclosure. Most self-report surveys, therefore, are designed to test the student body as a whole, and not specific elements of the student body.

Thus schools are caught in a bind. Many schools have statistical evidence demonstrating a significant drug problem among the student body as a whole, usually paired with some anecdotal evidence of drug use. But the *Earls* court says that this is not enough: there must instead be specific evidence of drug use in the targeted categories. Must schools wait for students to die, as in *Linke*, or is it sufficient to show a more general drug problem? And how should the relevant groups be defined? If there is solid evidence of a drug problem in the marching band, but anecdotal evidence points to the brass section as the troublemakers, can the school drug test the woodwinds? *Amici* respectfully submit

[70] 212 F.3d 1052 at 1064-1065 (7th Cir. 2000).

that in balancing the *Vernonia* factors, the courts should focus on the evidence of a drug problem in the general student population (*i.e.* usage rates above state and national averages, or direct evidence), and not on the evidence of drug use by specific subgroups of students.

Although the *Earls* majority promised to leave the determination of whether a school district had a severe enough drug problem to justify testing "to each school district,"[71] it is clear they did not do so in this case: the Tecumseh policy was overturned precisely because two judges on the Tenth Circuit disagreed with the elected Tecumseh school board as to the severity of its own drug problem. The *Earls* majority correctly stated that local school boards are in the best position to determine if their students should be required to submit to random drug testing as a condition of participating in extracurricular activities.[72] Leaving such discretion to the educators and administrators will not require courts to intervene on a school-by-school

[71] *Earls*, 242 F.3d at 1278.

[72] On October 7, 1999, the OSSBA sent a survey to all of its member school districts seeking to gauge the degree of interest of Oklahoma's public schools in the issue of student drug testing. Of the more than 500 surveys sent out, more than 300 responses were returned. The results showed that a number of school districts had already adopted some type of student drug testing policy. Of those schools that did not have a student drug testing policy in place, the majority of the responding school districts stated the reason was based on "unclear legal issues," and stated that they would be likely to adopt a student drug testing policy if those legal issues were clarified. On the other hand, nearly one-third of those schools that did not have a student drug testing policy in place responded that they did not see the need to adopt such a policy in their respective school district. This split clearly shows that so long as the law is clear on this issue, local school officials are more than capable than appellate judges of determining whether or not to adopt a student drug testing policy in their districts.

and subgroup-by-subgroup basis as seems to be taking place at the present time. The record shows that Tecumseh considered factors such as the cultural and social atmosphere surrounding the students, students openly exhibiting an attitude of approval of illegal drug use, and the community's strong concern about the issue voiced through pleas from Tecumseh parents and community for the school district to do something about the student drug abuse problem.[73] In adopting the policy in question, the Tecumseh school board was merely doing what it believed was in the best interest of the students, as confirmed by many of the community members responsible for electing them to the school board. They were seeking to ensure a safe learning atmosphere where the education of the students would not be clouded by the existence of student substance abuse.

Requiring that a specific drug problem exist before a school can implement a drug testing program is also inconsistent with the goal of *deterrence*.[74] In *Vernonia*, the Court went to great lengths to discuss the addictive dangers of drug use and called deterrence of that use important and even compelling.[75] To then say that a school must wait until the use begins to occur – and apparently until it reaches fairly high levels - makes little sense:

> We see no reason that a school district should be compelled to wait until there is a demonstrable

[73] *Earls v. Board of Education of Tecumseh Public Sch. Dist.*, 115 F.Supp.2d 1281, 1285-86 (W.D. Okl. 2000).

[74] *See, e.g., Miller*, 172 F.3d 580 (holding that the court did not believe that the lack of an immediate drug crisis "must necessarily push the Cave City policy into unconstitutional territory, as it does not mean that the need for deterrence is not imperative.").

[75] *Vernonia*, 515 U.S. at 661.

> problem with substance abuse among its own students before the district is constitutionally permitted to take measures that will help protect its schools against the sort of "rebellion" proven in *Vernonia*....[76]

The *Vernonia* Court acknowledged that waiting to catch students in the act of drug use - in other words, a program of suspicion-based drug testing - would be "impracticable" on numerous grounds.[77] As noted in *Miller*, drug testing students involved in extracurricular activities serves to deter drug use generally in the school. Tecumseh has stated that its intent in limiting its drug testing program to those engaged in extracurricular activities was not based on the premise that drug use in this portion of the student body was more prevalent, but rather that this group was chosen "in an effort to deter and hopefully eliminate drug abuse by the large part of the student population."[78] Participation in extracurricular activities has been shown to be linked to lower drug use itself.[79] Requiring a school district to wait until it can prove serious drug use among the students to be tested to begin the testing shifts the purpose of testing from deterrence to punishment.

[76] *Miller*, 172 F.3d at 581.

[77] *Id.* In rejecting the argument that drug testing based on reasonable suspicion would suffice to combat the problem, the Court refused to force school districts to turn their teachers into drug investigators, noting that "[i]n many respects, we think testing based on 'suspicion' of drug use would not be better, but worse." *Vernonia*, 515 U.S. at 664. Requiring teachers to make untrained decisions as to who has been and who has not been using drugs can lead to claims of discrimination and arbitrariness.

[78] Petitioners Cert. Brief at 6.

[79] *E.g. Nicholas Zill, et al.,Adolescent Time Use, Risky Behavior and Outcomes: An Analysis of National Data*, U.S. Department of Health & Human Services (1995).

The inherent arbitrariness of allowing courts to determine on a case-by-case basis when drug use is "serious" enough to warrant drug testing for the purposes of deterrence is highlighted in the recent case of *Gardner v. Tulia Indep. Sch. Dist.*[80] It involves a student drug testing policy virtually identical to that of Tecumseh. Tulia ISD presented the court with a survey conducted by the Texas Commission on Alcohol and Drug Abuse ("TCADA") that showed that 27 percent of Tulia ISD students self-reported using illegal drugs, and 10 percent reported attending school "stoned."[81] In declaring the Tulia ISD policy unconstitutional, the district court ignored the TCADA survey and concluded, "no major or widespread drug problem existed within any segment of the Tulia student body."[82] The court went on to state that the schools did not have an "above-average problem with drug use by students."[83] In fact the 27 percent usage rate among Tulia students was one percentage point below the 28 percent statewide average reported in the TCADA survey.

Must a school district wait until its number of student drug-users surpasses the state average to start deterring that use? If Texas had a 28 percent student drug use rate, but Arkansas only had a 26 percent student drug use rate, could a school district where 27 percent of the students use drugs test if it is located in Texarkana, Arkansas, but not if it is

[80] 2000 U.S. Dist. LEXIS 20253 (N.D. Tex 2000); *appeal docketed*, No. 00-11404 (5th Cir. Dec. 20, 2001).

[81] *See* Brief of the Appellants (on record with the Fifth Circuit Court of Appeals).

[82] *Gardner v. Tulia Indep. Sch. Dist*, 2000 U.S. Dist. LEXIS 20253, 5 (N.D. Tex. 2000).

[83] *Id.* at 5-6.

located in Texarkana, Texas? If Tulia ISD had been one percentage point above the state average (and therefore, presumably, able to test its students), but a new wave of imported drugs into Houston, Dallas, San Antonio and Austin drives the state average up, does that mean that Tulia ISD would have to stop testing until it catches up to the state average? These examples may seem far-fetched or even silly; but so is ruling that a school district where over one-fourth of the students admit to using drugs and 1 in 10 students have sat stoned in a classroom does not have a drug problem. As this Court noted over 15 years ago, "drug use and violent crime in the schools have become major social problems."[84] When the goal of a school is to deter student drug use, the current amount of actual use should be irrelevant.

One of the *Earls* majority's criticisms of the Tecumseh policy is that it constituted an ineffective means of achieving the goal of drug deterrence, because the policy only tested a select group of students (those who choose to participate in extracurricular activities) and did not test all students.[85] However, merely because a school chooses to take an intermediate step in dealing with a problem, rather than the "all or nothing" approach that the *Earls* majority seems to advocate, does not necessarily mean that the program is arbitrary or unconstitutional:

[84] *T.L.O.*, 469 U.S. at 339.

[85] *See, e.g., Earls*, 242 F.3d at 1277 & n.12 ("In essence, [the policy] too often simply tests the wrong students."). However, some courts have noted that at least in some school districts, a program that tested students participating in all extracurricular activities would reach a majority of the student body. For example, in Rush County, 77 percent of the student body was subject to the drug-testing program upheld by the court. *Todd v. Rush County Schs.*, 133 F.3d 984, 985 (7th Cir. 1998).

> The Legislature is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. There is no doctrinaire requirement that the legislation should be couched in all embracing terms.[86]

Testing students who participate in extracurricular activities for illegal drug use on a random, suspicionless basis is a reasonable and rational first step on the road to deterrence.

While the *Earls* majority seemed to question the efficacy of random drug testing, recent research indicates that suspicionless drug testing is in fact a very effective method of reducing student drug use. Researchers from the Oregon Health and Science University recently reported on a study designed to determine the efficacy of student athlete drug testing. After comparing drug use in schools that did drug test athletes with schools that did not, the researchers concluded that there was greater drug use in the control school, i.e. the school which did *not* drug test. "Drug testing may significantly reduce drug use among adolescent athletes."[87] Dr. Goldberg's results simply reflect common sense: suspicionless drug testing is effective because not only do students fear

[86] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937). *See also McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 809 (1969); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489 (1955).

[87] L. Goldberg, M.D., "*Drug Testing Adolescent Athletes: Does it Reduce Drug Usage? Results of a Prospective Randomized Trial*, Journal of Medicine in Sport and Exercise 2001, 35:5 (2001).

apprehension, but also the policy gives students an obvious and instantly accepted reason to "Just Say No". Thus, contrary to the Tenth Circuit's opinion in *Earls*, drug testing a group of students is, in fact, a very effective method of addressing student drug use.

CONCLUSION

In its concise closing, the *Vernonia* Court summed up its holding as follows:

> Taking into account all the facts we have considered above -- the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search -- we conclude Vernonia's policy is reasonable and hence constitutional.[88]

Where the goal is deterrence (not punishment), and the "most significant element" of the policy is that it is "undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care,"[89] a program that allows schools to test students who volunteer for extracurricular activities for illegal drug use on a random and suspicionless basis is reasonable and, hence, constitutional.

[88] *Vernonia*, 515 U.S. at 664.

[89] *Id.* at 665.

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